

# FUNDAMENTAL RIGHTS AND CONSTITUTIONAL AMENDMENT

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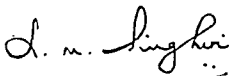
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# PREFACE

In the year 1967, the Institute of Constitutional and Parliamentary Studies adopted the idea of holding occasional "Conventions on the Constitution" with the object of securing a deeper analysis, elucidation and understanding of the structure and the dynamics of our constitutional system and our democracy. The First Convention was held in August 1967 in collaboration with the Bar Association of India, India International Centre and the Indian Commission of Jurists, on the theme of "Fundamental Rights and Constitutional Amendment." The choice of the topic was guided by the high degree of widespread and contemporaneous interest in the judgment of the Supreme Court in what is known as *Golak Nath's* case.

The First Convention, which has since been succeeded by two others, proved to be a unique event. The Convention was a confluence as well as a battleground. The discussions at the Convention had a vitality all their own and were deeply stimulating. The Proceedings of the Convention were submitted to the Joint Committee of both Houses of Parliament on The Constitution (Amendment) Bill, 1967 tabled by my distinguished friend, the late Mr. Nath Pai. I have great pleasure in making the records of the papers and discussions of the Conventions available to a wider reading public. The public and parliamentary debate following the judgment of the Supreme Court in the *Golak Nath* case and the passionate eloquence with which both sides have passed their claims vouchsafe the value and relevance of this volume for the specialised scholar as well as the lay and intelligent citizen.

I need hardly add the usual caveat that the views expressed in this volume are those of the paperwriters and the participants and the Institute or the General Editor are not in any way responsible for them.



GENERAL EDITOR

and

EXECUTIVE CHAIRMAN

New Delhi,  
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## *Fundamental Rights and Constitutional Amendment†*

CONSTITUTION of a country may be described as the foundational or the fundamental law on which all other legislation is based, tested and enforced. In a written Constitution, the authority, jurisdiction and powers of various organs of the State—Legislative, Executive or Judicial—are as defined and delimited by the provisions of the Constitution. The term amendment of the Constitution connotes a definite and formal process of constitutional change.

The nature and scope of the power to amend the Constitution in the face of countervailing pressures in the working of the Constitution during the last 18 years has assumed considerable importance. The Constitution that came into force on January 26, 1950 has already been amended 21 times.<sup>1</sup> Of the 21 amendments made so far, six amendments<sup>2</sup> (of which three affected Fundamental Rights)<sup>3</sup> were in reaction against the Supreme Court's interpretation of the Constitution, one was in acceptance of the Supreme Court's opinion,<sup>4</sup> and fourteen were to meet with the changed political circumstances or to make minor improvements or changes, sometimes of consequential nature, in other articles of the Constitution.<sup>5</sup> Of the four Constitution Amendments involving Fundamental Rights, two<sup>6</sup> affected freedom of speech and expression in article 19(1)(a) and (2); one<sup>7</sup> affected right to equality of the majority community as opposed to Scheduled Castes and Tribes, and educationally and socially backward classes in

† A Background paper prepared by the I. C. P. S. research staff.

1. See Appendix.

2. 1st, 4th, 6th, 15th, 17th and 20th Amendments.

3. 1st, 4th and 17th Amendments. 16th Amendment also affected Fundamental Rights but it was not to override any judgment of the Supreme Court or a High Court.

4. 9th Amendment.

5. 2nd, 3rd, 5th, 7th, 8th, 10th, 11th, 12th, 13th, 14th, 16th, 18th, 19th and 21st Amendments.

6. First and Sixteenth Amendments.

7. Seventh Amendment.

articles 15 and 29, one<sup>8</sup> affected right to carry on trade and business in article 19(1)(g) and three<sup>9</sup> affected right to property in articles 31, 31A and 31B.

### The Supreme Court and the Constitution

The power of Judicial Review on the constitutionality of state actions has been specifically recognised in the Constitution of India.<sup>10</sup> Article 13 empowers the courts to declare a law void if it is found to be inconsistent with the fundamental rights. For the enforcement of these rights, power to issue any order or direction or writ to any person or authority including governments is conferred on the Supreme Court by article 32 and on the High Courts by article 226. The remedial right enshrined in article 32 is also a guaranteed fundamental right.

The interpretative power of the Supreme Court is often exercised *ex post facto*, except when the President refers for its opinion any question of law or fact of public importance under article 143. The Constitution is addressed not only to the judiciary but to the other departments, legislature and executive as well, so that it is agreed by some that they know their functions and limitations. Until the Supreme Court's authoritative opinion on a particular provision of the Constitution comes forth they have the right to act, in discharge of their functions and exercise of their powers, as they understand the Constitution. In this respect, their right to act does not rest on the sufferance of the Supreme Court. This has been a fundamental consideration with the U.S. Supreme Court in giving a restrictive interpretation to certain constitutional limitations as a mark of respect or credence for or accommodating gesture to the other departments, understanding of the scope and extent of the constitutional limitations. It can also be said that this consideration proceeds from the belief that the Supreme Court's understanding is not always infallible.

The question of the amendability of fundamental rights came before the Supreme Court of India at three different times in the cases of *Shankari Prasad v. Union of India*<sup>11</sup>, *Sajjan Singh v. State of Rajasthan*<sup>12</sup> and *Golak Nath v. State of Punjab*.<sup>13</sup>

With their pronouncements in *Shankari Prasad Deo v. Union of India* (unanimous) reiterated in *Sajjan Singh v. State of Rajasthan* (by a majority of 3:2) the Supreme Court was taken to have affirmed the proposition that the fundamental rights of the individual under the Constitution—though sacrosanct and constituting limitations on the power of the executive and

8. *Ibid.*

9. First, Fourth and Seventeenth Amendments.

10. *State of Madras v. V.G. Row*, A.I.R. 1952 S.C. 196 (199).

11. A.I.R. 1951 S.C. 458.

12. A.I.R. 1965 S.C. 845.

13. In Writ Petition No. 153 of 1966 dated 27-2-1967; AIR 1967 S.C. 1643.

legislature—are not immutable and absolute in character but subject to Parliament's power to amend the Constitution under article 368. Now, a contrary view has been taken by the Court in *Golak Nath v. State of Punjab*, ascribing inviolability and transcendentality to the individual's fundamental rights under the Constitution. In this view, it is beyond the competence of Parliament acting under article 368 to take away or abridge the fundamental rights.

### **Constitutional Provisions Involved and the Problems of Interpretation**

The relevant provisions of the Constitution on the interpretation of which the present controversy revolves are articles 12, 13 and 368. The problems in the interpretation of these provisions briefly are:

- (i) What is the meaning of the words 'any law' in article 13 (2)? Does it include Constitutional Law or Acts of Parliament amending the Constitution?
- (ii) What is the meaning of the words 'this Constitution', and 'the Constitution shall stand amended in accordance with the terms of the Bill' used in the substantive part of article 368 and the heading of Part XX 'Amendment of the Constitution'? If these are taken to have reference to the whole of the Constitution then the fundamental rights cannot be excepted from the power to amend the Constitution under article 368.

Approached in terms of the literal connotation of these words and phrases the above two conflicting positions emerge. Such a conflict is resolved by the Courts either by applying the doctrine of harmonious construction or rendering policy judgement, by evaluating the propositions against historical, sociological, philosophical and pragmatic considerations. The first is a technical rule of construction commonly adopted by the Courts in England, Australia and Canada<sup>14</sup>, whereas the second is often adopted by the Courts in the USA. Different conclusions are arrived at by making use of one method or the other.

### **Meaning of 'Amendment' and 'Change'**

In the substantive part of article 368 the words 'amendment of this Constitution' are used, whereas the proviso to it is applicable only when the 'amendment' seeks to make 'change' in the specified articles. Amendment literally means "removal of faults or errors, reformation, the alteration of a Bill before Parliament, a proposed alteration which if adopted may even defeat the measure"<sup>15</sup>, meaning thereby the Bill to which the amendment was proposed. Whereas, the word 'change' literally means

14. In Canada, the recent trend is to adopt the second method.

15. See Shorter Oxford English Dictionary.

"the act or fact of changing, substitution or succession of one thing in place of another, substitution of other conditions, variety."<sup>16</sup> The term 'amendment', as understood by the students of government and the Constitution "has the core denotation of alteration or change. Historically, the change or alteration denoted was for the sake of correction or improvement. In the realities and controversies of politics, however, the nature of correction or improvement becomes uncertain so that alteration or change remains the only indisputable meaning as the term is applied..."<sup>17</sup>

However, the fact that the Framers have used the words 'amendment' and 'change' in the very same sentence in the Proviso to article 368 suggests an irrefutable conclusion that they knew of the distinctive meaning these words bear and that the context in which they are used, that is to say, if the 'amendment seeks to make change' in certain specified articles vital for safeguarding the basic characteristics of the federal policy then only it will be subjected to further requirements, would indicate that the word 'amendment' used in the substantive part is wider than and includes 'change'. In other words, from this juxtaposition one would infer that Framers used the word 'amendment' in the substantive part of the article in the latter sense, i.e., as understood by the student of Government and the Constitution, and not the sense in which they are defined in the dictionaries. The framers of the Constitution remained assumptive of this general proposition of the Constitutional law, particularly of the U.S., France, and Japan when they drafted article 368 by using the word 'amendment' therein, in spite of the fact that they had before them the examples of other Constitutions<sup>18</sup>, wherein the words "variation, addition, repeal, alteration", were used instead or in addition to or by way of explaining the word 'amendment'.

Rejecting the dictionary meaning of the word 'amendment' the Supreme Court (per majority) in *Sajjan Singh v. State of Rajasthan* took the view that "in the context reliance on the dictionary meaning of the word

16. *Ibid.*

17. See *A Dictionary of Social Sciences*, 1964 (Compiled by UNESCO).

18. Canada : Section 7 of the British North America Act: "Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Act, 1867, or any order, rule or regulation made thereunder."

Australia : Section 128 of the Commonwealth of Australia Constitution Act 1900 : "This Constitution should not be altered except in the following manner."

Eire : Article 46 of the Constitution of 1937 : "Any Provision of this Constitution may be amended by way of variation, addition, or repeal in the manner provided by this Article."

Ceylon : Section 29 (4) of the Ceylon (Constitution) Order in Council, 1946: "In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order."

is singularly inappropriate, because what article 368 authorises to be done is the amendment of the provisions of the Constitution. It is well known that the amendment of a law may in a proper case include the deletion of *any one or more of the provisions* of the law and substitution in their place of new provisions. Similarly, an amendment... may include modifications or change of the provisions or even an amendment which makes the said provisions inapplicable in certain cases." Justice Hidayatullah, as he then was, (dissenting on other point) however, noted a distinction between 'amendment' and 'change' for arriving at the conclusion of the majority. Concurring with this view, for Justice Wanchoo (dissenting, for minority) in *Golak Nath's case*<sup>19</sup>, it did not matter whether the words like 'repeal, alteration, variation' were not used in addition to 'amendment' because that in fact was the meaning given to the word in law. But the learned Judge (and also Bachawat, J. dissenting) when persuaded to extend the logic of this reasoning to hold that the scope of the word could go to the length of abrogating the whole of the Constitution and substituting in its place a new one or substituting or abolishing the vital institutions forming the basic characteristics of the Constitution, were content to say that it was open to doubt. but were positive to bring within the reach of its comprehensive scope the fundamental rights of the individual. Chief Justice Subba Rao (speaking for the majority), likewise, felt no necessity to express considered opinion on this all important question, but, differing from the minority view, held that certainly its reach, to the extent of taking away or abridging, cannot extend to the fundamental rights.

Taking these two judgments into consideration the scope of the meaning of the word 'amendment' would emerge thus: (i) the word 'amendment' does not bear the restricted dictionary meaning but is wider and includes change, substitution, modification, deletion, repeal etc.; (ii) this wider scope of the word does not extend to each and every provision of the Constitution; and (iii) it does not extend to the extent of taking away or abridging the fundamental rights (according to the majority) and as to whether or not it extends to the provisions dealing with the fundamental institutions established under the Constitution the whole Court unanimously deferred the question. The question, to which of the provisions of the Constitution its reach extends, needs answer from the court each time, unless final opinion is delivered on this point.

### Scope of Article 368 vis-a-vis Article 13 (2)

Article 368 speaks of "an amendment of *this Constitution*" in accordance with the procedure laid down therein for the purpose. The words

19. Bachawat, J. (dissenting) however, relied on the distinction between 'amendment' and 'change'.

"this Constitution" suggest two possible views in respect of the provisions of the Constitution that fall within the substantive part of the article:

(a) It may be said that the Framers having mentioned only certain articles or parts of the Constitution in the Proviso, can be taken to have attached less importance to all other provisions of the Constitution. As such they necessarily fall within the scope of the substantive part of the article, by meaning 'this Constitution' each and every provision of the Constitution. The Constitution being a legal sovereign, any body in whom it has conferred constituent power would be competent enough to remove those limitations, by amending the Constitution.

(b) On the other hand, it may be said that what importance or sanctity the Framers have attached to the other provisions of the Constitution, must necessarily be ascertained from the words of the respective provisions, historical background and fundamental purpose of the Constitution. The Supreme Court in *State of West Bengal v. Union of India*<sup>20</sup> in the context of Federal-State relations, categorically stated that legal sovereignty under the Constitution resides in the people. The British Parliament had transferred the sovereignty to the Constituent Assembly.<sup>21</sup> The Constituent Assembly having said in the opening words of the Preamble, "We the people of India" was deemed to have transferred the legal sovereignty to the people of India or recognised the fact that since the mandate they held from the people of India was of a limited nature and to frame a Constitution regulating or controlling the exercise of political power, they were not entitled to possess the residual sovereignty which ultimately passed on to the people of India. So understood, the people of India have given to themselves a Constitution which provides limitations or restrictions on the freedom of the holders of political power. As such, the word 'Constitution' in article 368 means only so much of it and no more, and that is why in regard to the units or organs wielding political power emphasis has been given to the basic elements of the federal polity by providing additional safeguards in matters important for relations *inter se*. In this context Parliament exercising power under article 368 is just another kind of body exercising political power, and the acts done by it would only be 'law' which is otherwise called 'Constitutional law'. But this 'Constitutional law' is devoid of the ultimate legal sovereignty which the

20. A.I.R. 1963 S. C. 1241 (1252).

21. The setting up of the Constituent Assembly was the result of a political or extra-legal compact or understanding between the leaders of the major Indian Political Parties (a delegate body of the Indian people as a whole) and the British Government. It had commenced work on 9th December, 1916. Subsequent thereto, a legal power "for the purpose of making provision as to the Constitution of the Dominion" was specifically conferred by section 8 (1) of the Indian Independence Act, 1947 on this purely political representative body of the people.

citizens of India have retained with themselves. The inclusive definition of 'law' in article 13 and the fact that the Framers, even though they had before them the provisions of other Constitutions relating to amendments distinctly stating "any provision of this Constitution"<sup>22</sup> and "any of the provisions of this Order (Constitution)"<sup>23</sup> etc., were content to use the words "this Constitution" might lead to such a construction.

### Judicial Interpretations

(i) The major premise of the first view was formulated by the Supreme Court in *In re Delhi Laws Act*.<sup>24</sup> Majority of the judges (including Shastri, J.,<sup>25</sup> as he then was) took the view that the Constitution being sovereign, the legislature, when acting within the limits circumscribing its legislative power, has and was intended to have plenary power of legislation. The Constitution though "is a gift of the people of India to themselves, it is not a sound political theory that the legislature acts merely as a delegate of the people."<sup>26</sup> As was stated by Sastri, J., "the maxim *delegatus non potest delegare* is not part of the constitutional law of India and has no more force than a political precept to be acted upon by the legislature in the discharge of their function of making laws, and the courts cannot strike down an Act of Parliament as unconstitutional merely because Parliament decides in a particular instance to entrust its legislative power to another in whom it has confidence or, in other words, to exercise such power through its approved instrumentality, however repugnant such entrustment may be to the democratic process. What may be regarded as politically undesirable is constitutionally competent."<sup>27</sup> This latter part of the observation was adopted by the majority in *Sajjan Singh v. State of Rajasthan* as a rule of construction by saying that "so far as our Constitution is concerned, it would not be possible to deal with the question about the powers of Parliament to amend the Constitution under article 368 on any theoretical concept of political science that sovereignty vests in the people and the legislatures are merely the delegate of the people. Whether or not Parliament has the power to amend the Constitution must depend solely upon the question as to whether the said power is included in article 368. The question about the reasonableness or expediency or desirability of the amendments in question from a political point of view would be irrelevant in construing the words of article 368." In fact the observations of Sastri, J. in the context related to the question of the delegation of

22. Section 46 of the Irish Constitution, 1937.

23. Section 29(4) of the Ceylon (Constitution) Order in Council, 1946.

24. A.I.R. 1951 S.C. 332.

25. The emphasis on his personal view is for the fact that contrary view was expressed by him in *Gopalan v. State of Madras*, A.I.R. 1950 S.C. 27(72).

26. Justice Mukherjee, A.I.R. 1951 S.C. 382(395).

27. *Ibid.*, p. 370.



legislative power. So far as the nature of the fundamental rights is concerned the learned judge had stated earlier in the same paragraph that "it is true to say that, in a sense, the people delegated to the legislative, executive and the judicial organs of the state their respective powers while reserving to themselves the fundamental rights which they made paramount by providing that *the state* shall not make law which takes away or abridges the rights conferred by that part."<sup>28</sup>

But Sastri, J., in *Shankari Prasad v. Union of India* (speaking for the Court) had to clarify his assertions in *Gopalan's* case and *In re Delhi Laws Act* case in relation to the power to amend the Constitution under article 368. The learned Justice accepted, following Dicey, that the Constitution mainly concerns with the creation of three organs of the state and the distribution of governmental powers among them and definition of their mutual relation; and that no doubt our Constitution-makers, following the American model, have incorporated certain fundamental rights in part III and made them immune from interference by laws made by the State, but thought that they were not intended to be immune from Constitutional amendment, because :—

- (1) the Framers must have had in mind the frequent occurrence of invasion of rights by the legislature and executive in exercise of their legislative power and not by alterations of the Constitution itself in *exercise of sovereign constituent power*;
- (2) if they were intended to be saved from the invasion by exercise of constituent power, it was easy for the Framers to make the intention clear by adding a proviso to that effect; and
- (3) both articles 368 and 13 (2) are widely phrased. Applying the doctrine of harmonious construction, *for the reason stated above*, 'law' in article 13 must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments of the Constitution.

Gajendragadkar, C. J. (for the majority) in *Sajjan Singh v. State of Rajasthan* added four more reasons;

- (4) the words used in the proviso unambiguously indicate that the substantive part of the article applies to all the provisions of the Constitution and it is on this basic assumption that the proviso prescribes a specific procedure in respect of amendment of the articles mentioned in clauses (a) to (c) thereof;
- (5) that when the Framers took the precaution of excluding certain matters from the scope of article 368, *e.g.* article 4 (2) and

28. *In re Delhi Laws Act*; A. I. R. 1951 S. C. 332.

article 169 (3)<sup>29</sup> if they intended, they could have likewise excluded fundamental rights from the scope of the amending power under article 368;

- (6) that the Framers circumscribing the fundamental rights by making specific provisions in Part III itself must have anticipated that in dealing with socio-economic problems the legislature may have to face, from time to time, the concept of public interest and other important considerations, which from the basis of restrictions on the fundamental rights may change and may even expand, as such it is legitimate to assume that they knew that Parliament should be competent to make amendments in these rights; and
- (7) that the theory of the immutability or inviolability of the fundamental rights breaks when the problem is viewed against the power of Parliament to amend article 368 itself which is specifically provided in it. Therefore, *even if the power to amend the fundamental rights were not included in article 368, Parliament can, by a suitable amendment of article 368 itself, take those powers.*

According to this view, legal sovereignty resides in the Constitution and would come to be exercised by the body which is empowered to amend the Constitution. For arriving at this view, however, article 13 has to be read subject to article 368 taking into consideration the general prevailing principles of constitutional law in the U.S.A. and other countries, which, in the context, were assumed to have been the basis for the formulation of our Constitution. Through these general considerations the learned judge in fact, brought to the fore the intention of the Framers expressed in the statements of Dr. Ambedkar (partly) and Shri Jawaharlal Nehru in the Constituent Assembly.

Controverting the majority view that the procedure laid down in article 368 for amending the Constitution is an ordinary legislative procedure with additional requirements as such what emerges thereafter is 'law' of the same nature as ordinary legislative 'law' and cannot be immune from the inhibitions of article 13, Wanchoo, J. (as he then was, speaking for minority) in *Golak Nath's* case added another reason to these :

- (8) A bill passed by following the procedure laid down in article 111 on being assented to by the President is not declared to be

29. Laws amending the 1st and 4th Schedules to the Constitution giving effect to the laws passed under article 2 (admission or establishment of new states) and article 3 (formation of new states and alteration of areas, boundaries or names of the existing states) if passed by Parliament are not deemed to be amendments of the Constitution for the purpose of article 368 [article 4 (2)]; likewise, laws abolishing or creating legislative councils in the states are not deemed to be the amendments of the Constitution for the purpose of article 368.

a 'law' for such a law is open to challenge in Courts on various grounds that it is in breach of any provision of the Constitution or that Parliament was not competent to pass it, whereas a Bill for the amendment of the Constitution if passed by requisite majority and assented to by the President, the Constitution itself declares that *the Constitution shall stand amended in accordance with the terms of the Bill*. This means:

- (a) The procedure laid down in article 368 cannot be considered akin to ordinary legislative procedure, as such the 'law' that emerges thereafter is not an 'ordinary legislative law' but a 'Constitutional law' not subject to article 13, for one should look to the quality and nature of what is done under article 368 and not lay so much stress on the similarity of the procedure contained in article 368 with the procedure for ordinary law-making, and
- (b) What Courts can see is whether the procedure provided in article 368 has been followed, for if that is not done the Constitution cannot stand amended in accordance with the terms of the Bill. But if the procedure has been followed *the Constitution stands amended in accordance with the terms of the Bill*, and there is no question of testing the amendment of the Constitution thereafter on the anvil of fundamental rights or in any other way, as in the case of ordinary legislation.

(ii) The major premise of the second view came to be expressed by the Supreme Court per Sinha, C. J. in *State of West Bengal v. Union of India*,<sup>30</sup> who, after distinctively pointing out the historical process of the transfer of legal sovereignty in India, took the view that the legal sovereignty in India resides in the people and, therefore, the limits of the federation to whom specified legislative powers have been given cannot be regarded as sovereign in that respect. The conclusion of this view was expressed 13 years ago by Sastri, J. in his separate opinion in *Gopalan v. State of Madras*<sup>31</sup>:

There can be no doubt that the people of India have in exercise of their sovereign will as expressed in the Preamble adopted the democratic ideal which assures to the citizens the dignity of the individual and other cherished human values as a means to the full evolution and expression of his personality and in

30. A.I.R. 1963 S.C. 1241 (1251-53).

31. A.I.R. 1950 S.C. 27 (72). He reiterated this view in his separate opinion in *re Delhi Laws Act*, A.I.R. 1951 S.C. 332 (370).

delegating to the legislature, the executive and the judiciary their respective powers in the Constitution reserved to themselves certain fundamental rights so called, I apprehend, because they have been retained by the people and made paramount to the delegated powers, as in the American model.

In the same breath the learned judge pointed out that though the high purpose and spirit of the Preamble as well as the constitutional significance of a declaration of fundamental rights should be borne in mind, so as not to stretch the language to square with this or that constitutional theory, the spirit, no less than its intendment, should primarily be collected from the natural meaning of the words used.

On a stricter interpretation of the text of the relevant provisions of the Constitution, Hidayatullah, J. and Madholkar J., disagreed with the majority view expressed by Chief Justice Gajendragadkar in *Sajjan Singh v. State of Rajasthan* and required more reasons than those given in *Shankari Prasad's* case to agree with their construction of articles 13 and 368 as to their relative impact upon each other. According to Hidayatullah, J.,

- (1) The Preamble to the Constitution is to be likened to the American Declaration of Independence rather than the preamble of their Constitution; as such it is, though not a part of the Constitution, a key to the mind of the Constitution-makers and gives a direction and purpose to the Constitution, which are referred to in Parts III and IV of the Constitution;
- (2) Article 13 is absolute in rendering void laws, inconsistent with the fundamental rights which being constitutional assurances were not meant to be the playthings of a special majority, otherwise it would mean that the door is always open for bringing back to life all the laws invalidated under article 13 (1) and (2), and reverse the policy of our Constitution, from time to time, by legislating with a bigger majority at any given time not directly but by Constitutional amendments and that the Constitution gives so many assurances in Part III that it would be difficult to think that they were the playthings of a special majority. To hold this would mean *prima facie* that the most solemn parts of our Constitution stand on the same footing as any other provision. The anomaly that article 226 should be somewhat protected but not article 32 must give us pause. Article 32 does not erect a shield against private conduct but against state conduct including the legislatures;
- (3) The ambit of the word 'law' in article 13 should be ascertained by reading its prohibitions in the light of declaration in the various articles in Part III.

- (4) Exceptions to the fundamental rights show that Part III is not static and that it visualised change and progress but at the same time it preserves individual's rights. There is hardly any measure of reform which cannot be introduced reasonably, the guarantee of the individual liberty notwithstanding; and that
- (5) the words of article 368, explicit as they are, do not give power to amend 'any provision' of the Constitution and 'this Constitution' does not mean each and every article wherever found and whatever its language and spirit. What article 368 does is to lay down the manner of amendment and the necessary conditions for the effectiveness of the amendments.

To these was added one more reason by Mudholkar, J.:

- (6) There are certain fundamental and basic features of the Constitution, e.g. democratic and republican form of Government etc. Every member of Parliament is under an oath or affirmation of true faith and allegiance to the Constitution. If upon literal interpretation of article 368 an amendment even of the basic features of the Constitution is made possible, it will be a question for consideration as to how to harmonise the duty of allegiance to the Constitution with the power to make an amendment to it. It is a question of paramount importance to the citizens of our country to know whether the basic features of the Constitution under which we live and to which we owe allegiance are to endure for all time or at least for the reasonable future—or whether they are no more enduring than the implemental and subordinate provisions of the Constitution.

### Golak Nath's Case

*The Majority View*: The conclusions and the reasoning of the majority judgments delivered by Chief Justice Subba Rao (for self, Shah, Sikri, Shelat and Vaidialingam, JJ.) in *Golak Nath's* case could be summarised thus:

- (1) The fundamental rights have to be viewed in the general context of the Constitution. The Preamble to the Constitution is not a mere platitude. The means of realising the principles enshrined in the Preamble are worked out in detail in the body of the Constitution and every authority—executive, legislature and judiciary established by the Constitution—is subject to them. The Constitution which is supreme has empowered the legislatures to make laws and in Part IV prescribed the objectives which are to remain fundamental in the governance of the country. Since the Constitution-makers feared that uncontrolled and unrestricted power in the hand of the government might

lead to an authoritarian state, they ordained a higher judiciary which was to act as the sentinel of the fundamental rights of the individual and as the balancing wheel between individual freedom and social control. The Rule of Law under the Constitution was designed to serve the needs of the people without infringing their rights. Every institution or political party that functions under the Constitution must accept it. Otherwise it has no place under the Constitution.

- (2) The fundamental rights are natural rights or moral rights which every human being, because he is rational and moral, everywhere, and at all times, ought to possess. They are the primordial rights necessary for the development of human personality. In these, the Constitution has included the right of the minorities, untouchables and other backward communities. The Constitution enjoins the State not to make laws which take away or abridge these declared rights. They are subject only to the limitations contained in the respective articles. This gives fundamental rights a transcendental position and takes them beyond the reach of Parliament.

The fundamental rights and directive principles constitute an integrated scheme forming a self-contained code. The scheme is made so elastic that all the directive principles of state policy can reasonably be enforced without taking away or abridging the fundamental rights, subject to social control. The Constitution itself provides for the suspension or the modification of fundamental rights under specific circumstances, *e.g.* articles 33, 34, 35, 358 and 359. This suggests the conclusion that under no other circumstances the state can take away or abridge fundamental rights.

- (3) Article 368 does not confer any power to amend the Constitution. It essentially prescribes, as is evident from its marginal note, various procedural steps in the matter of amendment. The power to amend the Constitution cannot be read in article 368 by implication because whenever the Constitution sought to confer such a power on any authority it expressly said so, *e.g.* articles 4 and 392. There is no necessity to resort to the doctrine of implied power when Parliament is vested with expressly stated plenary powers to make any law, including the law to amend the Constitution, under articles 245 and 248 read with Entry 97 of List I.

The fact that there are other conditions such as a larger majority and, in the case of articles mentioned in the proviso, a ratifica-

tion by State legislatures, does not make the amendment any the less a law and the amending agency a different body. The imposition of further conditions is only a safeguard against hasty action and a protection to the States. Articles 2, 3, 4 and 169 provide for passing of laws by Parliament to amend the constitution and declare that 'laws' so passed would not be amendments of the Constitution for the purposes of article 368. This shows it would be an amendment within the meaning of article 368.

In support of this proposition two decisions of the Privy Council in *Mc Cauley v. the King*<sup>32</sup> and *Bribery Commissioner v. Pedrick Ramasinghe*<sup>33</sup> dealing with a similar question relating to the Constitutions of Australia and Ceylon, respectively, were cited. Illustrations from the foreign Constitutions which differentiate amending process from the legislative process are immaterial in construing the provisions of our Constitution. The nature of amending power generally depends upon the nature of polity created by the Constitution, e.g., federal or unitary, written or unwritten, or rigid or unrigid, and the spirit and genius of the nation in which that Constitution has its birth. The power to amend need not be absolute, for it is left to the Constitution-makers to impose restrictions thereon and prescribe the scope of the power and the method of amendment having regard to the requirements of the particular State.

- (4) The 'law' in its comprehensive sense includes constitutional law and the 'law' amending the Constitution is constitutional law. Article 13 (2) gives an inclusive definition of the word 'law'. It does not exclude and, in fact, *prima facie* takes in constitutional law.
- (5) It cannot be said that if fundamental rights can not be amended it would prevent Parliament from enforcing the directive principles and this would lead to revolution. Fundamental rights are introduced exactly to prevent this attitude of Parliament and the Constitution-makers thought, and the majority of the Court agreed, that the directive principles could be reasonably enforced by Parliament within the self-regulatory machinery provided by Part III. Parliament's verdict on the scope of the law of social control of fundamental rights is not final but justiciable.

32. 1920 A.C. 691.

33. 1964 2 W.L.R. 1301.

Secondly, history shows that revolutions are brought about not by the majorities but by the minorities and sometime by military coups. The existence of an all comprehensive amending power cannot prevent a revolution if there is chaos in the country brought about by misrule or abuse of power; and

Thirdly, this construction of the amending power does not make the Constitution unchangeable even in respect of the fundamental rights—when the whole country demands such a change. For such a contingency the residuary powers of Parliament under articles 245 and 248 read with Entry 97 may be relied upon to call for a Constituent Assembly or Convention or hold Referendum analogous to the opinion poll held in Goa, Daman and Diu, since under the scheme of our Constitution the remaining Constituent sovereignty, which is contained in the Preamble and Part III, is in abeyance because of the curb placed by the people on 'the State' under article 13 (2).

- (6) The agrarian structure of our country has been revolutionised on the basis of correctness of the decisions in *Sankari Prasad's* case and *Sajjan Singh's* case. To give the present decision retrospectivity would be to introduce chaos and unsettle the conditions in the country. At the same time to hold, because of these consequences, that Parliament had power to take away fundamental rights would be passing gradually and imperceptibly under a totalitarian rule. As the highest Court of the land we must evolve some reasonable principle to meet this extraordinary situation. In America the doctrine of prospective overruling is now accepted in all branches of law, including Constitutional law, but the carving of its limits are left to the courts having regard to the requirements of justice. If a court can overrule its earlier decision there cannot be any valid reason why it should not restrict its ruling to the future and not to the past. The doctrine does not do away with the doctrine of *stare decisis*, but confines it to past transactions. While in strict theory it may be said that the doctrine involves making of law, what the court really does is to declare the law but refuses to give retroactivity to it. It enables the court to bring about a smooth transition by correcting its errors without disturbing the impact of those errors on past transactions.

The Constitution does not speak against the doctrine of prospective overruling. Articles 32, 141 and 142 are couched in such wide and elastic terms as to enable the court to formulate legal doctrines to meet the ends of justice. The expression 'declared'



in article 141 is wider than the words 'found or made'. To declare is to announce 'opinion'. The latter involves the process, while the former expresses the result. Interpretation, ascertainment and evolution are parts of the process, while that interpreted, ascertained or evolved is declared as 'law'. In declaring law the court has the power to restrict the operation of the law declared. To deny this power to the court on the basis of some outmoded theory would be making ineffective the powerful instrument of justice placed in the hands of the Court.

Since the doctrine is being applied to our country for the first time we should move warily in the beginning and lay down that

- (i) the doctrine can be invoked only in matters arising under our Constitution;
- (ii) it can be applied only by the Supreme Court; and
- (iii) the scope of the operation of the doctrine is left to the Supreme Court's discretion to be moulded in accordance with the justice of the cause or matter before it.

As such on the application of the doctrine to the case the First, Fourth and Seventeenth Amendments will continue to be valid and the Parliament will have no power from the date of this decision to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights.

Hidayatullah J., as he then was, delivering a separate judgment *inter-alia* made the following points:

- (1) The Court in *Sankari Prasad* and *Sajjan Singh's* cases reached the result by a mechanical jurisprudence in which harmonious construction was taken to mean that unless article 368 itself made an exception the existence of any other provision indicative of an implied limitation on the amending power could not be considered. It was based on '*a priori*' view of the omnipotence of article 368, a doctrinaire conceptualism based on an arid textual approach supplemented by one concept. No part of the Constitution is superior to another part unless the Constitution itself says so. On the answer to the question of reconciling article 368 with article 13(2) depends the solution of all the problems in this case.
- (2) Our Constitution is much more than an organisational document because it aims at being a social document in which the relationship of society with the individual and of government to both and the rights of minorities and backward classes are clearly laid

down. The Preamble to the Constitution epitomizes principles on which the Government is to function and these functions are later expanded into fundamental rights and directive principles. The former are protected and represent the limits of State action but the latter, which are obligations and the duties of the Government, are not. The Constitution was not the cause but the result of political and personal freedom.

- (3) The definition of the word 'law' in article 13(2) makes no exception to 'constitutional law.' Though a distinction between 'constitutional law' and 'law' is made, as in the U.S.A., it is not always essential, as in England. The Constitution itself has considered some of the ordinary laws (laws made under articles 327 or 328) as constitutional laws. The distinction does not exist if the legislative and constituent processes become one. The view held in the U.S. on this distinction is not final because the process of amendment in the U.S. is not a legislative process and there is no provision like our article 13(2). This apart, there is nothing to prevent the State from limiting itself and this we find in article 13(2). The State is, no doubt, legally supreme but in the supremacy of its powers it may create impediments on its own sovereignty. Though the Government is always bound by the restrictions created in favour of fundamental rights but the State may or may not. The State means more than any of its functionaries such as Government, Parliament, Legislatures, local and other authorities, or all of them put together in article 13(2), which subjects the State to fundamental rights, controls the agencies of the State jointly and separately and its prohibition is against the whole force of the State, acting either in its executive or legislative capacity. In other words the declarations of the fundamental rights are the inalienable rights of the people and the Constitution enables an individual to oppose successfully the whole community and the State and claim his rights. Therefore, if an amendment of the Constitution is a 'law', such an amendment is open to challenge under article 32, if it offends against the fundamental rights by abridging or taking them away. Of course, it is always open to better fundamental rights. As such the unlimited competence does not flow from the amendatory process. Amendments then can be by a fresh constituent body.
- (4) Article 368 outlines a process, which, if followed strictly, results in the amendment of the Constitution. The article gives power to no particular person or persons. All the named authorities have to act according to the letter of the article to achieve the

result. The procedure of amendment, if it can be called a power at all, is a legislative power but it is *sui generis* and outside the three lists in Schedule Seven of the Constitution. It does not have to depend upon any entry in the lists.

- (5) The liberty of the individual under our Constitution, though meant to be fundamental is subject to such restrictions as the needs of society dictate. These are expressly mentioned in the Constitution itself in the hope that no further limitations would require to be imposed at any time. The possession of the necessary majority does not put any party above the constitutional limitations implicit in the Constitution. The Constituent Assembly, in making the fundamental rights justiciable, was not satisfied with reliance on the sense of self-restraint or public opinion on which the majority in *Sajjan Singh's* case does. The Parliament today is not the constituent body as the Constituent Assembly was, but is a constituted body which must bear true allegiance to the Constitution. To act otherwise would be to usurp the function placed outside the pale of its authority.
- (6) There is no antinomy between the directive principles and fundamental rights. The former lay down the routes of State action but such action must avoid the restrictions stated in Part III and it cannot be conceived that in following the directive principles the fundamental rights can be ignored. If it is attempted, the action is capable of being struck down.
- (7) It cannot be said that the approach adopted here would make society static, rob the State of its sovereignty and leave revolution as the only alternative if change becomes necessary. The whole Constitution is open to amendment; it is only two dozen articles that are kept outside the reach of article 368, because they are made fundamental. When the people elect the Parliament and the Legislatures, they exercise their electoral sovereignty which includes some constituent sovereignty also, but only in so far as it is conceded. A legal method for Parliament to reach the fundamental rights is that the State must reproduce the power which it has chosen to put under a restraint by calling a convention or a constituent body. Parliament must amend article 361 to convoke another Constituent Assembly, pass a law under item 97 of List I to call a Constituent Assembly and then that Assembly may be able to abridge or take away the fundamental rights, if desired.
- (8) The First, Fourth and Seventh Amendments being part of the Constitution by acquiescence for a long time, cannot now be

challenged and they contain authority for the Seventeenth Amendment. A constitution works only because of universal recognition which may be voluntary or forced.

Justice Hidayatullah, therefore, held:

- (i) that the fundamental rights are outside the amendatory process if the amendment seeks to abridge or take away any of the rights;
- (ii) that *Shankari Prasad's* case (and *Sajjan Singh's* case which followed it) conceded the power of amendment over Part III of the Constitution on an erroneous view of articles 13(2) and 368;
- (iii) that the First, Fourth and Seventh Amendments, being part of the Constitution by acquiescence for a long time cannot be challenged and they contain authority for the Seventeenth Amendment;
- (iv) that this Court having now laid down that fundamental rights cannot be abridged or taken away by the exercise of amendatory process in article 368, any further inroad into these rights as they exist today will be illegal and unconstitutional unless it complies with Part III in general and article 13(2) in particular;
- (v) that for abridging or taking away fundamental rights, a constituent body will have to be convoked; and
- (vi) that the two impugned Acts, namely, the Punjab Security of Land Tenures Act, 1953 (X of 1953) and the Mysore Land Tenures Act, 1953 (X of 1953), as amended by Act XIV of 1965, are valid under the Constitution not because they are included in Schedule 9 of the Constitution but because they are protected by article 31A and the President's assent.

These conclusions and the supporting reasoning led the majority of the Court to overrule its decision in *Shankari Prasad Deo v. Union of India* and *Sajjan Singh v. State of Rajasthan* which had held that: (i) though the fundamental rights have been made immune from State interference and that in the context, 'State' did not mean the body exercising constituent power, and (ii) if it was to be otherwise it was easy for the Constitution-makers to make that intention clear by adding a Proviso to that effect in article 368. By applying the doctrine of harmonious construction to the widely phrased articles 368 and 15(2), the Court had held, in these two cases, that the term 'law' in article 13 must be taken to mean laws, bye-laws, rules, regulations etc. made in the exercise of ordinary legislative power and not amendments to the Constitution, and that in any case, immutability of Part III cannot be sustained in the face of Parliament's power to amend article 368 itself. This was supported by the minority view in *Golak Nath's* case.

*The Minority View:* The minority view was that the power of amendment conferred on Parliament included the power to amend the fundamental rights so as to take them away or abridge them. Giving the main dissenting Judgment, Wanchoo J., as he then was, held:

- (1) The power to amend the Constitution is conferred upon Parliament by article 368 and not by article 245 or 246 or 248. The power so conferred is not limited either expressly or by implication.
- (2) An amendment to the Constitution is a constitutional law made in the exercise of constituent power which is not the same as ordinary legislative power under which laws are made.
- (3) The cases of *Shankari Prasad* and *Sajjan Singh* were decided correctly and while article 13(2) prohibits a law abridging or taking away the fundamental rights, it does not restrict the constituent power given by article 368 to amend any part of the Constitution including the fundamental rights. The word 'law' does not apply to amendments of the Constitution.
- (4) The power to amend the Constitution means that any part of it can be changed to such an extent as the sovereign body deems fit.

### Reactions to the decision

The majority view of the nature of fundamental rights *vis-a-vis* amendatory power of Parliament taken in *Golak Nath's* case has evoked both criticism and approbation. Those who criticize the Court's verdict hold, with varying degrees of emphasis, that the Supreme Court appears to have:

- (i) discarded the intention of the Founding Fathers by reading into the Constitution its own political philosophy reminiscent of the 19th century *laissez faire* philosophy, and has registered its own supremacy, in playing the role of the protector and sentinel of the fundamental rights, over the Constitution and those institutions established by it to exercise that supremacy, in other words, it has placed itself over the Constitution;
- (ii) mooted a dangerous proposition that the ultimate sovereignty, individual *qua* state, not only political but also legal, resides in the people, which would come to be exercised by devising extra-constitutional machinery or methods, e.g., referendum, initiative, *ad hoc* Constituent Assembly etc.;
- (iii) reversed the constitutional order acquiesced by practice and created juridical instability by treating earlier precedents somewhat lightly;

- (iv) attempted to retread the path which the U. S. Supreme Court had forsaken as far back as in the thirties; and
- (v) ascribed static and rigid element to the Constitution which was in reality intended to be dynamic and purposive, to subserve always the interest and welfare of the general public.

On the other hand those who hail the judgment hold that by this judgment the Supreme Court has:

- (i) imposed a necessary limitation on the power of Parliament to amend the Constitution which had come to be exercised rather indiscriminately;
- (ii) also adhered to the language and the text of the Constitution faithfully;
- (iii) restored confidence in the minorities (linguistic, cultural, religious, economic, social etc.) that the fundamental rights guaranteed to them as a result of political settlement arrived at in the Constituent Assembly are, in essence 'fundamental' and can never be the playthings in the hands of the majority;
- (iv) convinced the people that the trust reposed in the Court as a guarantor and protector of individual's fundamental rights by the Founding Fathers was not an exercise in futility; and
- (v) by giving the judgment 'prospective operation' protected the economic and social order created by the majority in accordance with their understanding of the Constitution with the concurrence of the earlier Benches of the Supreme Court.

### **The Nature of the Judicial Process : Issues and Approaches**

In arriving at the conclusion that the power to amend the Constitution cannot be read in article 368 which only lays down procedure for amending the Constitution and that this power under articles 245 and 248 read with article 368 or the power in article 368 which is only a legislative power *sui generis* outside the three lists in Schedule Seven, cannot be exercised in such a way as to take away or abridge fundamental rights, since the law amending the Constitution is a 'law' within the meaning of article 13(2), the Supreme Court by a majority of 6 : 5, in *Golak Nath's* case, overruled its own unanimous decision in *Shankari Prasad Deo v. Union of India* and majority (3 : 2) decision in *Sajjan Singh v. State of Rajasthan* and gave it prospective operation, adopting a different process of reasoning. It rendered value judgments quite distinct from the values subscribed to on earlier occasions. The judgment holds out three salient features or methods of judicial process. They are: overruling, prospectivity and approach.

(i) *Overruling and approach*: The conflict in the Court's views in the *Shankari Prasad* and *Golak Nath's* cases proceeds from the difference in approach and relatively greater emphasis on one object in one case and another in the other. A reference to the Constituent Assembly debates and other preparatory documents would not be decisive in resolving this controversy<sup>34</sup>. The Framers spoke of these poles-apart concepts in absolute terms in separate contexts, without scrupulously adverting to the impact they would have on each other if allowed to expand to their possible limits. In *Shankari Prasad* and *Sajjan Singh's* cases the Court, finding conflict between article 13 (2) and article 368, applied the doctrine of harmonious construction and by presuming that in imposing the prohibition of article 13(2) the Framers must have had in mind what is of more frequent occurrence, i.e., invasion of the rights of the subjects by the legislative and executive organs of the State, and not by the exercise of sovereign constituent power, rendered the value judgement that the word 'law' in article 13(2) though very widely phrased, in the context, should be read subject to the inherent power to amend the Constitution that lay in the bodies named in article 368. The fact that the Framers themselves acting

34. In the context of fundamental rights it was said that they should be guaranteed in a manner not permitting their withdrawal under any circumstances (*Motilal Nehru Committee Report*, 1928); fundamental rights should be looked upon as something we want to make permanent in the Constitution (Jawaharlal Nehru presenting *Interim Report on Fundamental Rights*); fundamental rights were not glittering generalities or pious declarations but made real by guaranteeing their enforceability by the Supreme Court under article 32 (*Advisory Committee on Fundamental Rights*, Dr. Ambedkar, *C. A. Deb.* VII, p. 953); the rights given to the minorities (social, religious, economic, cultural) were the result of compromise in the spirit of give and take investing trust in the generosity and the sense of fairness and justness of the majority (Jawaharlal Nehru and Patel, *C.A. Deb.* VIII, pp 333, 332, 311 and 354; Munshi and Nehru, *C.A. Deb.* IX, pp. 1192-1193); the Parliament can amend any article of the Constitution which is not mentioned in Part III or article 305 (368) by two-third majority, (Dr. Ambedkar *C.A. Deb.* XI, p. 1661). The fact that the Cabinet mission suggested the appointment of an Advisory Committee on the fundamental rights of citizens, minorities and tribal and excluded areas having on it the representatives of interests affected and the constitution of such a Committee on whose recommendation the Constituent Assembly adopted the Chapter on fundamental rights, would indicate that they were the result of compromises and in spirit and real intentment were not meant to be the plaything of a majority. In the context of Parliament's power to amend the Constitution under article 368 it was said that Indian Parliament may, by law, repeal or alter any of the provisions of the Constitution (*Motilal Nehru Committee Report*, 1928, sec. 8); the Constitution was intended to be a solid and permanent structure but not at the cost of flexibility and nation's growth or the growth of living vital organic people (Jawaharlal Nehru *C.A. Deb.* VII, p. 332); the will of a generation can bind itself but should not bind the succeeding generations (Jefferson quoted by Dr. Ambedkar, *C.A. Deb.* XI, pp. 975-6); the Constitution has provided a facile procedure for amending the Constitution, it is

as the Provisional Parliament, resorted to this power for passing the Constitution (First Amendment) Act, 1951 can be assumed to have had its decisive influence in making the Court introduce such a reading in between the gaps inadvertently left unplugged by the Framers. The conclusion of the Court that article 13(2) should be read subject to article 368 was deliberate though in *Sajjan Singh's* case an attempt was made to fit it in the phrasology of article 368. The rule so laid down was received and acted upon by the other organs of the State for 16 years creating, modifying, extinguishing or alienating the innumerable rights of the individual *inter se* or *vis-a-vis* the State or Society as to which the Court even in *Golak Nath's* case did not take any effective exception.

It is true that the absolute power to amend the Constitution so conceded by the Court was resorted to too frequently and had formidable consequences in nullifying some of the major decisions of the Supreme Court, involving interpretations of the constitutional provisions, more particularly those relating to the fundamental rights of which the Court was constituted a guarantor and protector. The emergent position was the working of parliamentary supremacy or legislative supremacy in a disguised form. The question was whether by conferring such an absolute power the Constitution could be deemed to have contained self-defeating or self-destructive provisions. This factor was highlighted in the Court's estimation in *Golak Nath's* case and doubt was entertained whether the fundamental rights could ever be fundamental if they were made a plaything in the hands of the majority. In encountering such an apprehension, it should not have been lost sight of that even though the Framers in drafting the property provisions failed to assure themselves that it unmistakably carried their intention as to the concept of property right and its extent in the context of the predominant social interest they thought to introduce in it, different means<sup>35</sup> were still open to the Supreme

only for amending few articles that ratification of the State legislatures is required and all other articles of the Constitution are left to be amended by Parliament (Dr. Ambedkar, *C.A. Deb.* VII, pp. 43-44); the Assembly has not only refrained from putting a seal of finality and infallibility upon this Constitution by denying the people right to amend it and those dissatisfied with it have only to obtain a two-thirds majority and if they do not secure to get this majority, their dissatisfaction with the Constitution cannot be shared by the people (Dr. Ambedkar, *C.A. Deb.* XI, pp. 975-76); the power vested in the Supreme Court under article 32 could not be taken away unless and until the Constitution itself is amended by means open to the legislature (Dr. Ambedkar, *C.A. Deb.* VII, p. 958); and that the Constitution has eliminated the elaborate and difficult procedures such as a decision by a Convention or a Referendum (Dr. Ambedkar, *C.A. Deb.* VII, pp. 43-44).

35. It could have adopted the canon of construction suggested by Chief Justice Stone: "We read its (the Constitution's) words not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government" (*U.S. v. Classic*, 313 US 229 (1941)) and by Chief Justice Taney: "It (the Constitution) speak not only in the same words, but with the same meaning



Court to construe it in consonance with the directive principles which are addressed as much to the Court as to the Legislature and Executive, for, the inclusive definition of the word "state" in article 12 read with article 36 covers the Supreme Court. Thus Hidayatullah J. was led to remark: "all would have been well if the courts had construed article 31 differently."<sup>36</sup> The alternative was open to the Court but it did not prefer to seize it. The judicial process is a creative instrument and has immense potentiality to be geared in furtherance of the objectives of the Constitution (so also of other laws). There was a case, in fact, to hedge the sovereign prerogative to interpret the Constitution, to declare what the law of the land is and pass such decree or make such order as would do complete justice in the pending cause or matter, by the considerations of the objectives of the Constitution. The rigid adherence to the English literalist process that words speak everything that they were intended to convey, led the Court to sow the seed for the present dichotomy. No one may quarrel with the Court's view that the directive principles are capable of being translated into reality without taking away or abridging the fundamental rights, as this was also the intention of the framers. It could be done only by assigning to them the scope intended by the framers. It certainly could not be done when the Court placed undue emphasis on and read wider scope even in those fundamental rights that impinged drastically the scope of the directive principles. The Parliament should not be blamed, if, to counteract the imbalance thus created, it proceeded with a pace not desired of a body subjected to the order postulated by the Constitution.

The major premise of the Court that the fundamental rights being the bedrock of the political existence of the people have been given a place of permanence in the scheme of the Constitution and in giving to themselves the Constitution the people have reserved the fundamental freedoms to themselves expressed in article 13 (which should not be taken as protecting the right) is supported by the Court's opinion in *State of West Bengal v. Union of India*<sup>37</sup> that the historical process of the transfer of legal sovereignty in India has been such that the legal sovereignty has come to reside in the people and not the Units of the Federation to whom specified legislative powers have been given by the Constitution. The Constituent Assembly had extra legal or political origin, deriving its mandate from the people of India through different types of representative groups. The extent of the mandate being of an unspecified nature, when the Cons-

and intent with which it spoke when it came from the hands of its framers and was voted and adopted. Any other rule of construction would abrogate the judicial character of this court... .. *Dred Scott case*, 19 Howard 393 (1857).

36. *Golak Nath v. State of Punjab*, A.I.R. 1967 S.C. 1643.

37. A.I.R. 1963 S.C. 1241 (1251-53).

tuent Assembly, in pursuance of the legal power conferred on it subsequently by the British Parliament to frame a Constitution for the Dominion of India, adopted the Preamble in the name of the people of India, it can be taken to have recognised the fact that its legal sovereignty, in terms of its unspecified mandate, belonged to the people. Viewed against this background it would be obvious that the full force of article 13 read with article 12 covers every conceivable authority functioning under the Constitution and that the residual sovereignty vests in the people.

With a view to effectuate a change in the hitherto established proposition that Parliament's constituent power was of absolute nature, the majority of the court in *Golak Nath's* case emphasised the inclusive definition of the word 'law' in article 13 and, of 'State' in article 12 and referred to the higher order postulated by the Preamble. The Court said that Parliament, acting in any capacity, is not above the Constitution but always subject to it. The ambit of article 368 was restricted to that of laying down the procedure for amending the Constitution<sup>38</sup> or that it is only a legislative power.<sup>39</sup> The Court refused to be persuaded to bring to bear on its construction the absolute scope assumed by the constitution-makers (which was expressed during the debates in the Constituent Assembly in this context but was not made explicit in the phraseology of article 368) and expressed by overt conduct, while functioning as Provisional Parliament, when they enacted the Constitution (First Amendment) Act, 1951.

It may be pointed out here that while the Court referred to the legislative history of the fundamental rights to compute the degree of importance attached to them by the Framers, it failed to refer to the legislative history of article 368. Perhaps, this happened merely because the value judgements of the Court in *Shankari Prasad* and *Sajjan Singh's* cases were not akin to the six judges' concept of the hierarchy of values of the constitutional order. They based their construction on the relative scope of articles 13 and 368 that suited their philosophy. If they could do this today, they being in majority, the judges of other preferences, gaining majority subsequently, can as well undo it and superimpose their own values. Should the values of the constitutional order change so often as there is change in the Court's composition, the concept of the permanency of the Constitution would become meaningless.

(ii) *Prospectivity*: Having decided to take a contrary view of the fundamental rights *vis-a-vis* the constituent power, five out of the majority of six judges were confronted with the problem:

38. Chief Justice Subba Rao.

39. Justice Hidayatullah.

The agrarian structure of our country has been revolutionised on the basis of the said laws (i.e., agrarian reform laws passed on the correctness of the decision in *Shankari Prasad* and *Sajjan Singh*), should we now give retrospectivity to our decision it would introduce chaos and unsettle the conditions in our country. Should we hold that because of the said consequences Parliament had power to take away fundamental rights, a time might come when we would gradually and imperceptibly pass under a totalitarian rule.

The judges did not desire any of these consequences to flow from their decision. They could see them averted in the adoption of the doctrine of "prospective operation" well known to American jurisprudence but alien to English jurisprudence. Under the doctrine the future is protected while preserving the past. The five judges negated the objection that the doctrine involved legislation by courts for the reason that while in strict theory it may be said that the doctrine involves making of law, what the court really does is to declare the law but refuses to give retroactivity to it. It is really a pragmatic solution reconciling the two conflicting doctrines, namely that a court finds law and that it does make law. If it finds law but restricts its operation to the future, it enables the court to bring about a smooth transition by correcting its errors without disturbing the impact of those errors on the past transactions. It is left to the discretion of the court to prescribe the limits of the retroactivity and thereby it enables it to mould the relief to meet the ends of justice.<sup>40</sup>

It is within the absolute province of the Court to pass such decree or make such order as is necessary for doing complete justice in the pending cause or matter under article 142(1) and it can opt to bring the doctrine of 'prospective operation' in its jurisprudence. But does it fit in the scheme of our Constitution? In a different context the Court has held the view that the constitutional provisions in Part III are not merely checks but go to the root of the power<sup>41</sup> and that a statute void for unconstitutionality is dead and can not be vitalised by removing the constitutional objection.<sup>42</sup> Applying this principle to *Golak Nath's* case the Constitution (Seventeenth Amendment) Act, since it violated article 13(2) should be void *ab initio*. Exactly opposite conclusion was reached by

40. "The expression 'declared' is wider than the words 'found or made'. To declare is to announce opinion. Indeed the latter involves the process, while the former expresses result. Interpretation, ascertainment and evolution are parts of the process, while that interpreted, ascertained or evolved is declared as law". Chief Justice Subba Rao in *Golak Nath's* case.

41. *Behram Khurshid v. Bombay State*, A.I.R. 1955 S.C. 123 (145). The Court in this case held inapplicable the American Doctrine that an unconstitutional statute is not void but only voidable or unenforceable or remains dormant so long as that constitutional interpretation stands.

42. *S. Ahmed v. State of U.P.*, A.I.R. 1954 S.C. 728 (739). Both these decisions were upheld and followed by the Court in *Deep Chand v. State of U.P.*, A.I.R. 1959 S.C. 648 and *Mahendralal v. State of U.P.*, A.I.R. 1964 S.C. 1019.

applying the doctrine of 'prospective operation'. It would mean, therefore, that in the light of the Court's holding as to the nature of article 13(2)'s inhibition, the adoption of the 'prospective operation' theory in adjudicating cases under article 13(2) is inappropriate. The judges advocating the adoption of this theory did not advert to this anomalous position. If the injunction of article 13(2) goes to the root of the power of the State under the Constitution, the Supreme Court, included as it is in the term 'State', can be said, with respect, to have acted, in adopting the prospective operation theory, in excess of its constitutional propriety. This conclusion might establish firmly the doctrine of *Stare Decisis* with its attendant evil in our country but it is the logical outcome of the Court's decisions in *Behram Khurshid* and others.<sup>41</sup>

Secondly, in the adoption of the doctrine of prospective operation the Court, by its own logic, may be said to have surrendered the fundamental rights of the individual to that extent. It is intriguing to say in one case that the Court as a sheet anchor of the individual's fundamental right cannot see them being waived by the individual himself in favour of the State and in another, with a view to accommodate the catena of unconstitutional State Acts, surrender the fundamental rights by itself.

The antidote suggested by the Court to the rigidity introduced thereby in respect of fundamental rights, i.e., convening of *ad hoc* Constituent Assembly, Convention, Referendum or Initiative is too omnibus to put in practice with precision.

The mere fact that an amendment is passed by the Constituent Assembly or Convention or in a Referendum or Initiative would not be enough. It would still be justiciable and can be struck down by the Court. It might be possible for the Court, as constituted at a given time, to regard the process of such constitutional amendments as an extra-constitutional fact not amenable for judicial review.

Then there is the important question raised by Shri N. C. Chatterjee, M. P. in his letter to the President—"If Parliament cannot directly take away or abridge a fundamental right, how can it authorise its agent to do so merely by calling 'Constituent Assembly'. The so-called Constituent Assembly created under a law made by Parliament will only be a constituted body and cannot be raised to the status of a Constituent Assembly."

#### Points for Consideration

(i) If the principle of Constitutional Law laid down in *Golak Nath's* case is considered judicially or politically desirable or timely and is acceptable :

- (a) What should be the composition of the machinery and the manner of carrying the amendments through the Constituent

Assembly or Convention or Referendum or Initiative which would satisfactorily implement the essence of the idea that pervades the majority judgment in *Golak Nath's Case*?

- (b) Will it not be necessary to introduce therein the concept of the vital interest of the community in general as opposed to a section or sections, either large or small in the composition and procedure of such a machinery; if so to what extent?
- (c) Should the principle of Constitutional law in *Behram Khurshid, Saghir Ahmed* and other cases be reconsidered by the Court as it is in direct conflict with the principle in *Golak Nath's case*? If not, what could be the points for distinguishing them?
- (d) Is it not necessary that whenever the Court deliberately pronounces a value judgment interpreting the Constitution, it should not subsequently disturb the order so established even though there might be other logical reasons suggesting a contrary view? Since its pronouncements affect the entire constitutional order, should it not impose self-limitations on its absolute discretion in declaring the law, interpreting the Constitution and passing any order to do complete justice in the pending cause or matter? Should it not be desirable or necessary to impose such limitations on the Supreme Court's powers?
- (e) For unsettling the established constitutional order or interpretation, should a decision by 2/3 or 3/4 majority of the Court not be insisted upon by effecting a suitable amendment in that regard?
- (f) To what other fundamental provisions of the Constitution the protection of the rule in *Golak Nath's case* be allowed to extend?
- (ii) On the other hand, if the principle of constitutional law in the *Golak Nath* case is not acceptable, being reminiscent of 19th century *laissez faire* philosophy and unsuitable to the fast developing needs of the new emerging India, there are at least two ways open:
  - (a) Parliament may amend article 368 so as to clearly lay down therein that Parliament has the power to amend all the articles of the Constitution including fundamental rights notwithstanding anything contained in any other part of the Constitution;
  - (b) It is open for the Court to review its judgment in *Golak Nath's case*. It can be done expeditiously on a reference being made by the President under article 143 or by re-agitating the matter in an appropriate case.

Should the Court decide to revert to the earlier constitutional order, further thought need be given to making it difficult for Parliament to tamper with the fundamental rights lightly, by providing that:

- (i) the ratification by 3/4 of the number of States would be necessary for all amendments affecting fundamental rights; and/or
- (ii) that a constitutional amendment taking away or abridging the fundamental rights passed by Parliament would not take effect until it is affirmed by a Parliament constituted after the next general election?

### ANNEXURE

#### Provisions of the Constitution affected by Various Constitutional Amendments

<i>Year</i>	<i>Constitution Amendment No.</i>	<i>Articles Amended</i>
1951	1	15(4), 19(2), 19(6), 31A inserted, 31 B inserted, 85, 87, 174, 176, (1) 176(2), 341(1) 342(1).
1952	2	81(1) (b).
1955	3	7th Schedule List III.
1955	4	31(2), 31A(1), 31A(2) (b), 305.
1955	5	3 Proviso.
1956	6	269(1) (g), 269(3), 286(1) Explanation, 286(2) 286(3).
1956	7	1(2), 1(3) (b) 3 Proviso, 16(3), 31A(2), 49, 58, 66 Explanation, 72(3), 73(1) Proviso, 80(1) (b), 80(2), 80(4), 80(5), 81, 82, 101(2), 112(3) (d) (iii), 131 Proviso, 143(2), 151(2), 152-237-Part VI heading, 152, 153, 158(3A) 170, 171, (1), 214(1) (2) (3), 216 Proviso, 217 (1), 217(2) (b), 219, 220, 222(1) (2), 224, 229(1) (2) Provisos, 230-231, 238, 239, 240, 241(1) (3) (4), 242, 243, 244(1) etc.
1960	8	334.
1960	9	66(1).
1961	10	240(1) (c).
1961	11	71(4) inserted.
1962	12	240(1) (d).
1962	13	369-392 Part XXI, heading, 371A.
1962	14	81 (1) (b), 239A, 240 (1) (e), 240(1) Proviso.
1963	15	124(2A), 128, 217(1), 217(3), 222(2), 224(3) 224A, 226(1A), 226(2), 297, 311(2) (3), 316(1A).
1963	16	19(2), 19(3), 19(4), 84(a), 173(a).
1964	17	31A(1), 31A(2).
1966	18	3.
1966	19	324.
1966	20	233A.
1967	21	8th Schedule for inclusion of Sindhi.

## *Points arising out of Golaknath's case : An Analysis*

• B. VAIKUNTA BALIGAT†

**F**OR THE FIRST time by a majority of 6 against 5 Judges of the Supreme Court, a view is expressed indicating incompetence on the part of the Parliament to legislate by amending the provisions of Part III relating to fundamental rights.

### **Points for consideration**

Are limitations upon the powers of the Parliament in amending the Constitution in so far as the amendment takes away or abridges the fundamental rights guaranteed in Part III, as envisaged in the view of majority of Judges of the Bench in *Golaknath's case*<sup>1</sup> correct and proper? If so, is there any remedy open to remove all or any such limitations? Is the theory of prospective operation of invalidity applicable in India and if so to what extent?

### **Basic approaches**

Sovereignty of an independent country like ours in a democratic set up is full and complete. No portion of it can exist outside or be in vacuum. Negatively sovereignty can never be in the third limb of the Constitution, viz., the judiciary. Judiciary is independent but not sovereign. It is not subordinate to executive. It expresses the last word in deciding matters that come up before it. That decision or conclusion or adjudication is binding upon all courts in India and indirectly on all citizens of the Republic.

In interpreting any constitution the background that existed immediately prior or at the time of framing the constitution deserves consideration. Concepts as they prevailed and were understood by the framers of the constitution are of great significance and bearing. One has to under-

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1. A.I.R. 1967 S. C. 1643.

stand the minds and the intentions of the framers in interpreting the language of the statute.

Federation and federalism are two concepts to be precisely stated and equally precisely understood. Each federation has its own distinct individual characteristics. Federations may be of different varieties. For instance, independent and sovereign states may federate together and create a constitution in writing—partly or in full. Sovereignty that exists in each of the units will take a different shape when it emerges as a resultant of federation. In the mode adopted certain areas might be kept in precise shape as inviolable. In the variegated systems of constitution that are existing or that are likely to come into existence hereafter it is not possible to have uniformity or principles governing one constitution as rigidly applicable to the issues arising out of another federal constitution. Therefore, immense caution is wanted before blindly applying the reasoning relied on in a case decided under a different constitution.

As a preliminary step it will be but proper to demarcate with clarity and precision the functions of the Legislature and Judiciary. It has best been expressed by Abraham Lincoln in his inaugural address, March 4, 1861:

I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes.

There are a large number of similar dicta from most eminent authorities.



Another approach is indicated by James Madison in the Report on the Virginia Resolution (1800), *vide* Debates on Federal Constitution, 549-550 (1836):

However, true, therefore, it may be, that the judicial department is, in all questions submitted to it by the forms of the Constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the authorities of the other departments of the Government; not in relation to rights of the parties to the constitutional compact, from which the judicial, as well as the other departments, hold their delegated trusts. On any other hypothesis, the delegation of judicial power would annul the authority delegating it; and the concurrence of this department with the others in usurped powers, might subvert forever, and beyond the very Constitution which all were instituted to preserve.

### Contents of Sovereignty

It is an axiomatic truth that in all democracies sovereignty rests wholly and in the first resort in the public and the citizens. For due exercise of it the elected representatives function in a legislature to reveal the mind of the people. Human society is in perpetual progress. Therefore nations have been held to be capable of changing the pattern of laws if the interests of the nation so require. This is an inalienable right. To whatever extent the powers may be delegated in the Constitution of the Indian Republic there are no indications that lay down that there is any area beyond the reach of the sovereignty of the nation. It is the nation that constitutes the final tribunal in a democracy. It is incorruptible and cannot be replaced by something better. Despite complexities that have arisen on account of party pressures or pressure groups or individual sections of interest, by and large, the public are the safest judge. It may be that in certain constitutions entered into between sovereign units that a particular area (*e.g.* equal representation in the Parliament) has been agreed to be unalterable. This aspect does not arise under our Constitution. The States if ever they are to be deemed to have entered into federation by their own volition were not independent states bargaining for individual interests for and on behalf of sovereign states.

Thomas Jefferson said:

Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age wisdom more than human, and suppose what they did to be beyond amendment... Laws and institutions must go hand in hand with the progress of the

human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.....The real friends of the constitution in its federal form, if they wish it to be immortal, should be attentive, by amendments, to make it keep pace with the advance of the age in science and experience.

Justice Brandeis of the U.S. Supreme Court made similar observations in *Oklahoma Ice Co. v. Liebmann*, 285 U.S. 262, pp. 310-311. He observed:

The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation... There must be power in the States and the Nation to remould through experimentation, our economic practices and institutions to meet changing social and economic needs.

In addition to these there are others—almost every modern book on democracy dealing with the aspects under consideration—who affirms the principle that constitutions are not immutable and for all time to come. John Hay has expressed the conservative viewpoint when he said: "that those who own the country ought to govern it." This was not accepted at the time when it was mooted. This view is now accepted in almost every country.

With the above prefatory remarks it would be proper to proceed to the detailed considerations.

The society in our country—politically, economically and in sovereignty—has to be taken note of. The trailing effect of British rule and attempted contributions to jurisprudence during British rule in the shape of (i) guided democracy; (ii) paramountcy prevailing in British Parliament; and (iii) sovereignty subject to paramountcy under the Indian Princes of independent States, are not applicable and have to be wiped out. Besides, majority of thinking minds, in which are also included the category of judges, have borne the impress of British jurisprudence. This acts as a pull back in the true interpretation. So one can select a few from among a multitude of speeches made in framing the Constitution and reflecting the opinion of the people. Dr. Ambedkar observed:

The (Constituent) Assembly has not only refrained from putting a seal of finality and infallibility upon this Constitution by denying the people the right to amend the Constitution as in Canada or by making the amendment of the Constitution subject to the fulfilment of extraordinary terms and conditions as in America or Australia,

but has provided for a facile procedure for amending the Constitution... If those who are dissatisfied with the Constitution have only to obtain a 2/3 majority and, if they cannot obtain even a two-thirds majority in the Parliament elected on adult franchise in their favour, their dissatisfaction with the Constitution cannot be deemed to be shared by the general public.

Pandit Jawaharlal Nehru, in this connection, observed:

No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there, it can point it out, but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately the whole Constitution is a creature of Parliament... it is obvious that no court, no system of judiciary can function in the nature of a third House, as a kind of Third House of correction. So, it is important that with this limitation the judiciary should function... ultimately the fact remains that the legislature must be supreme and must not be interfered with by the courts of law in such measures of social reform. Otherwise, you will have strange procedures adopted. Of course, one is the method of changing the Constitution. The other is that which we have seen in great countries across the seas that the executive, which is the appointing authority of the judiciary, begins to appoint judges of its own liking for getting decisions in its own favour, but that is not a very good method.

It would be futile to contend against the proposition that in framing the Constitution the framers did intend to prevent any amendment of the Constitution when exigencies of situation might create in future or subsequent thereto. Therefore one can conclude the field of debate by assuming that the power of amending the Constitution is normal and inalienably contained in the concept of sovereignty, unless explicit words or other facts or factors prevent a conclusion of such a power existing.

### **Sovereignty under the Constitution and Judicial Interpretation**

Articles 4 and 169 and Sch. V, para 7 and Sch. VI, para 21 provide for amendment of the Constitution. Further article 368 provides for amendment of the Constitution. It is contained in Part XX of the Constitution designated thus "Amendment of the Constitution". The detailed provisions have to be scrutinised. It is fruitless to analyse the various aspects or concurrent conditions to be observed in amending the Constitution except that we must carefully ponder over the particular kind

of amendment of the Constitution which is now in focus. It relates to possible amendments of the provisions of Part III—Fundamental Rights. In this behalf great reliance is placed upon Article 13 which lays down that "All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void." This disposes of the group of laws made prior to independence which will necessarily include those made by subordinate legislature or by a foreign Parliament. It is clause (2) of article 13 that really raises the point at issue. It says: "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause, shall, to the extent of the contravention, be void." In Clause (3) of the same article it is further provided as follows: "In this article, unless the context otherwise requires,—(a) 'law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law." Be it noted here that the definition enumerates by inclusion and not by defining all the subject heads enumerated for inclusion or things having lesser efficacy than the word 'law'.

At this juncture it would be proper to have in mind the distinction between legislative power and constituent power. Constituent power is to write in part or in full the Constitution. To the extent that it is done by legislature and the procedure adopted is that of legislation it can be said that they are alike in some aspects but in the characteristics of their classes or in fields of their operation they are distinctive and separate. Perhaps in common parlance it can even be said that constituent power is a specialised legislative power. The import of the statutes that will emerge from exercise of legislative power and from exercise of constituent power are easily distinguishable. Legislative power is to make laws. Constituent power is a 'power to frame or alter a political constitution, as constituent assembly, constituent power.' (Concise Oxford Dictionary). The primary function of a constituent assembly is, perhaps, solely to frame a constitution. Immense literature is available for bringing out the distinction between legislative power and constituent power. This distinction, however, has never been lost sight of even in the instant case.

After the enactment of the Constitution there have been about 21 Amendments. Of this, only four dealt with and modified fundamental rights: they are, first, fourth, sixteenth and seventeenth. The first amendment impinged upon articles 31, 15 and 19. None of these have been held to be invalid despite a large number of occasions on which they came up for consideration by the Supreme Court prior to *Golak Nath's* case. Suffice to refer to the latest case prior to the one under consideration,

i.e., *Shankari Prasad's case* [1952, SCR 89, (1651) ASC 458]. In *Shankari Prasad's case* the Supreme Court held that the power to amend our Constitution was contained in article 368. The term "law" found in article 13(2) did not include the amendment of the Constitution because an amendment of the Constitution is made in exercise of the constituent power. Negatively it is not made in exercise of the legislative power. The challenge to the 17th amendment was repealed in *Sajjan Singh v. State of Rajasthan* (1965 I SCR 903) where the majority held that *Shankari Prasad's case* was rightly decided and further found the position so clear that they did not think it necessary to refer the question to a larger Bench [(1965) I SCR at page 950].

The basis of the reasoning, as can be gathered from a spate of articles and comments on *Golak Nath's case*, is that fundamental rights contained in Part III are so basically protected by indicating that no law made even after the commencement of the operation of the Constitution can be valid if it is inconsistent with the provisions of the fundamental rights. In other words the fundamental rights are to endure for all time to come despite the changes that might have come about or in spite of existing imperative need to resolve conflicts in adhering to the Constitution.

The question, therefore, reduces itself to this. What was the intention of the Framers of the Constitution? As can be gathered from the express provisions made in so considering the Constitution it becomes necessary to understand the rationale and the principles on the basis of which the Constitution was enacted. People of India prior to the Constitution or Independence had not the freedom of speech, freedom of association, equal opportunities to all and right to possess property in an unfettered manner. Naturally, in order to provide a main plank for flourishing of democracy and the country thereafter, these were provided. It is indisputable that prosperity and progress were the watch-words and the aspects of progress and prosperity were not only as thought of and understood at the time of enactment of Constitution but even after the subsequent period. It is futile to think that the Framers of the Constitution had the idea that even if circumstances arose necessitating amendment in respect of provisions of Part III, it should not be amended; because the one little step that could have been taken would be laid down like that. To illustrate, suppose the Constitution contained the words "the fundamental rights guaranteed in this Part shall not be capable of being varied even by an amendment of the Constitution." The idea was capable of being expressed in whatever language they wanted. They did not do so. To import by legal interpretation that that was the intention of the Framers of the Constitution would be travesty of commonsense. It is here that an observation of Joseph Bradley, Justice of the Supreme Court of the

United States becomes apt. He said, "He was fearful, however, that judicial exuberance might create repressive barriers to legislation." In the idea of Justice John Marshall Harlan it would be "illegitimate judicial legislation."

Likewise similar expressions—say, a proviso in article 368 or in an article in Part III—could have been incorporated. This has not been done. Absence of such provision is perhaps the most eloquent argument because in effect it amounts to importing into the Constitution an idea and words which do not exist there by themselves. So it is brought under a process of reasoning which reasoning can now be analysed as is done in the succeeding paragraphs.

### Analysis and Evaluation of the Court's Reasoning

In *Golak Nath's* case Subba Rao, Chief Justice opines that wiping out proprietary rights by amending the Constitution amounts by implication to a revolution and therefore the interpretation he seeks to 'law' results thus: "On the other hand such a restrictive power gives stability to the country and prevents it from passing under a totalitarian or dictatorial regime." He further agrees that the Constitution is only permanent and not eternal and that there is nothing to choose between destruction by amendment or by revolution, the former is brought about by totalitarian rule, which cannot brook constitutional checks and the other by the discontentment brought about by misrule, and therefore, such considerations are out of place in construing the provisions by a court of law. The most pertinent of the views now under consideration are as observed in these words: "Nor are we impressed by the argument that if the power of amendment is not all comprehensive there will be no way to change the structure of our Constitution or abridge the fundamental rights even if the whole country demands for such a change. Firstly this visualizes *an extremely unforeseeable and extravagant demand*; but even if such a contingency arises, the residuary power of the 'Parliament may be relied upon to call for a Constituent Assembly for making a new Constitution or radically changing it. The recent Act providing for a poll in Goa, Daman and Diu is an instance of analogous exercise of such residuary power by the Parliament. We do not express our final opinion on this important question." It follows from this firstly, that the Indian Constitution is so sacrosanct as to be beyond amendment. Only in view of the express provisions of the Constitution the residuary power of the Parliament may have to be relied upon to call for the Constituent Assembly for making a new Constitution or radically changing it. So the avenue of escape under the extreme position of changing the Constitution radically, a Constituent Assembly is necessary. The changes dealt with by the judgment could not be said to be radical when

compared with the overall picture and provisions of the Constitution nor is it said that article 368 will not apply when radical change is wanted. Suffice however to observe that there is a residuary power that could be invoked. Why should residuary powers be invoked when there is express provision like article 368? In whom is this residuary power vested now? Is it in the Parliament or somebody else? Inferentially it looks that it is in the Parliament, because approving reference is made to the Act passed by the Parliament providing for a poll in Goa, Daman and Diu. What exactly is the procedure for calling a Constituent Assembly; how are the members thereof to be elected and what will be political, legislative or legal basis for it? It looks as if the dominance of the idea that power to amend has to be held to exist has allowed to mixing up of ideas. Equally so, improper importance is attached to the viewpoint that provisions of Part III, i.e., fundamental rights are not variable by an amendment of the Constitution by the present Parliament.

At this juncture it might be noted that preponderance of opinion is found from the expressions of the various Judges and even in the instant case the division of opinion is by 6 to 5. And of the six, Justice Hidayatullah seems to have his own approach. Chief Justice Subba Rao's observation that no constitution has been brought to the attention of the court which provides for its amendment and also contains a clause like article 13(2); the Privy Council case (1965 Appeal Case 172), *Bribery Commissioner v. Ranasinghe* which has not missed the attention of Justice Subba Rao, arose out of the Ceylon Constitution which in its Sec. 29(3) contains a similar clause in respect of religious minorities protected by Sec. 29(2). The special reservation was made in Sec. 29(3) of the Ceylon Constitution. It said: "Any law made in contravention of sub-section (2) of this Section, i.e., 29, to the extent of such contravention be void." Perhaps Chief Justice Subba Rao, had this aspect been mentioned to him or he had become appraised of this provision, would not have decided like this.

Really there is no inconsistency between the Constitution and the amending Act. The inconsistency contemplated in article 13(2) is with regard to any law which takes away or abridges the same in contravention of this clause to the extent of such contravention. The law that is spoken of here is not in any other article of the Constitution, but a law which does not find a place in the Constitution or is *de hors* or is outside the Constitution. It is such a law that is prohibited. To infer that the does not flow or follow because when the amendment is carried out it becomes part and parcel of Part III and the Constitution also.

Three aspects arise for consideration. Several treatises and judgements of various courts in several countries have dealt with what is called

the political content of a judgment. In other words political motivation in legislation is dealt with. According to recent developments in view of the fast changing pattern of the society and the people, political science has advanced considerably. It is inextricably connected with the Government or the country. The resultant that ensues from deliberations of politicians and executive create the field for the legislature. The legislature deliberates and passes a statute. The courts are called upon to adjudicate upon the validity or *intra vires* or *ultra vires* nature of the legislation. Everything being reduced to minimum, the court has judged upon the competence of the legislature or otherwise. Political motive or policy of the Government does not really come in for a review or assumption by the court. Therefore, in adjudicating upon constitutional issues the court may have in its mind the entire array of facts and evolving trends and the needs of the society. But the relative importance and propriety of the deliberations and the correctness of the conclusion arrived at—these matters are beyond the competence of the Court. If the court begins to analyse the propriety or soundness, the Judge converts himself into a politician or a legislator, while he is really neither. Even if he is in his individual capacity a politician, a Judge does not function as a politician and has to divest himself of his political bias and deal with the abstract legal position of a legislative enactment, being within the competence or beyond the competence. Separate file dealing with the aspects of the domain of politics or the area of operation of legislatures in contradistinction with the jurisdiction of the court is prepared.

A new theory that is just emerging in some other countries, viz., of prospective operation of invalidity has been introduced into this judgement. Basically a statute is valid or invalid from inception. It cannot be valid for certain purposes or for certain time or with regard to a multitude of operations done upto a particular period but will be declared by a court to be inoperative or invalid to control the future dealings. This is one of the things that a court of justice should avoid. The theory is yet to be located on the Indian soil. If it is to be done so far as amendments to the Constitution are concerned, it has to be definitely rejected. If on the other hand it is to be invoked at all with regard to the *intra vires* or *ultra vires* nature of any legislation arising out of distribution of legislative powers or associate matters it might go on a different footing. Theory of prospective invalidity is a splitting up of principle of *stare decisis* which means let the decisions stand as they are. This theory allows the decisions upto that date to stand as they are but choses to say that for the future that cannot be done. - That will amount to discrimination. Unless more compelling reasons than are found in the instant judgement are brought forth it will not be proper to accept it.



In construing statutes not excluding the Constitution Act there are well known maxims of interpretation. An elementary rule is that the words used to express the intention of the legislature must be construed in harmony with that intention. Maxwell in his book on Interpretation of Statutes, 8th Edn., says: "The Preamble of a statute has been said to be a good means of finding out its meaning, and, as it were, a key to the understanding of it; and as it usually states, or professes to state, the general object and intention of the legislature in passing the enactment, it may legitimately be consulted to solve any ambiguity, or to fix the meaning of words which may have more than one, or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt." Besides the Preamble in our Constitution there are a number of other articles which yield to the conclusion that the power of the Parliament to amend the Constitution is not taken away.

Even on a consideration of article 368 *vis-à-vis* article 13 the principle of harmonious construction requires that they should be separately constructed as they are independent of each other. Article 368 is not merely a procedural article but also a substantive article. Attempt is made to place the power of the Parliament to amend the Constitution in relation to the distribution of legislative powers. In the first instance it may be stated that it is not necessary to invoke it. Part XI which deals with distribution of legislative powers is a different topic from Part XX which is headed "Amendment of the Constitution." The object of articles 245, 246 and 248 envisage a different approach from that of article 368 and that is why they have been put in different Parts.

Great reliance is placed in interpreting article 13 upon the function of word 'law'. But a close scrutiny of the same with article 12 which begins with the words "In this Part, unless the context otherwise requires...." indicates an approach wherefrom the distinction between legislative power and constituent power is established.

That there is a conflict between fundamental rights and enforcement of directive principles is beyond debate. True it is that directive principles are not placed on the same status as fundamental rights. Fundamental rights can be said to be mandatory to the extent they exist. Directive principles are to be endeavoured. But in so far as the field of amendment of Constitution is concerned it would be wise and proper to place greater emphasis on the directive principles than on fundamental rights. It is to be remembered that amendments contemplated uptill now are not for abrogating the Part of fundamental rights but for necessary alterations to some extent of these rights. Reasonable restrictions or modifications required in the wider

interests cannot be said to be tantamount to abrogation. Chief Justice Subba Rao falls into an error when he opines that amendments 1, 4 and 17 along with others indicate a push into totalitarian regime. Dictatorship is yet far far away from Indian democracy. The transcendental position of fundamental rights that has prevailed in the mind of the Chief Justice is carried too far as to make directive principles ineffective and inefficacious. The antithesis that is now felt is basic and not peripheral. Fear is entertained by the court that if it is held that Parliament had power to take away fundamental rights a time may come when the country will gradually and imperceptibly pass under a totalitarian rule. This fear is more imaginary, unfounded than real. Human society has to change to keep in tune with the needs for progress and prosperity of the nation. Stagnation should be eschewed and cannot be maintained in an organic developing society. Even a good custom should not be allowed to "corrupt the world". In short, the judgement projects a view that sovereign constituent power can never be used to bind succeeding generations. If the people of any generation feel that a particular alteration in the Constitution is not only expedient but essential and imperative as otherwise disastrous or grave consequences will ensue, it would be perfectly within the province of a sovereign nation to consider its political evolution and decide upon the steps to be taken. In this respect there could be no bar of any kind whatsoever. Politics ought to be eschewed by the court. Politicians and legislators are better judges of that. If ever the courts take on themselves the role of adjudicating on the correctness of political conclusions it will be a gross abuse of judicial powers. The circumstances that led to the amendments, viz., 1st, 4th and 17th, which are opined by the majority of judges as invalid reveal that legislation enacted by various States were declared to be invalid, *inter alia* on the ground that it is beyond the competence of the State Legislatures to interfere with fundamental rights.

In so far as the doctrine of prospective overruling, the decision of the court whatever it be, it has only prospective operation and the three amendments mentioned above would continue to be valid. This in fact is a sort of compromise. They suggest that three amendments are in truth and effect invalid but refuse to touch the previous amendments upto-date but declare that there shall be no longer any amendment of fundamental rights in future. It would be wise to wait for a real opportunity to arise, gather the facts of any future amendment and adjudicate thereon rather than put a blanket embargo upon future legislation. For all that we know there would not be any prayer of that type in the pleadings. There was no need to adjudicate on hypothetical considerations. In so doing the majority judges of the Bench have reduced that portion of judgment to mere *obiter dicta* and not a conclusive adjudication. It

is an axiom of law that courts will always decide upon the matters at issue before them and not traverse beyond that. Field of law cannot be made unprecise by opinions of this type. It would be a dangerous doctrine. In so far as it upholds the operation of these three amendments it is placing the matter within the competence of the legislature. No power has ever been attributed to a court to make a law valid which was invalid on account of lack of jurisdiction to enact that law. The very circumstance that everybody not excluding the courts did not come to the conclusion over a long period that they were invalid ought to have put these judges on their guard in coming to a different conclusion.

### Conclusion

In the light of what is mentioned above the answers to the three questions formulated will be as follows:

(1) The restrictions envisaged by the majority of the judges of the Bench are not right and the Parliament is competent to amend Part III, i.e., provisions relating to fundamental rights.

(2) On the second point, even if there should be any doubt with regard to the normal powers of the Parliament, the constituent powers can be invoked and will require to be invoked; the same public opinion through similar representatives will be the one that will be gathered. In such exercise of constituent powers even the deliberations of a Constituent Assembly be invoked. In short the position reduces itself to making any particular item, that will be covered by a legislation by Parliament, which will infringe the provisions on fundamental rights, form an item in the election manifesto or the candidates that will contest the elections and the successful candidates will become the representatives armed with that mandate and will deliberate upon this matter and the conclusions arrived at by a majority will be the result on which legislation is to be passed. This will be rather an anomalous position.

(3) On the third point it will be wise and proper to think many times before introducing prospective overruling by courts on matters of constitutional law, for the simple reason that legislature will still have the power to amend to cross over the hurdles created by the prospective overruling.

## *Fundamental Rights vis-a-vis Amendment of the Constitution*

•BALKRISHNA†

THE JUDGMENT OF the Supreme Court in *I.C. Golak Nath and others v. the State of Punjab and another* enunciates the doctrine that the fundamental rights contained in Part III of the Constitution of India are "immutable" and "beyond the reach of Parliament". Further it introduces for the first time the doctrine of prospective overruling in the juridical system of our country. Both these doctrines are pregnant with far reaching consequences and deserve thoughtful consideration by everyone who holds dear to his heart the orderly and peaceful progress of the country.

The court has rested its doctrine of immutability of fundamental rights on two major premises—one philosophical in nature and the other juridical in character.

The first premise which underlines the opinion delivered by the Chief Justice on his behalf and on behalf of his four colleagues is that fundamental rights are not the creation of any external authority but inhere in the very personality of the individual. "They are" in the words of the Chief Justice "the modern name for what have been traditionally known as natural rights." He cites with approval the observations of an author to the effect that 'fundamental rights are moral rights which every human being everywhere at all times ought to have simply because of the fact that in contradiction with other beings he is rational and moral.' The Chief Justice emphasises this further by observing that "they are primordial rights necessary for the development of human personality. They are rights which enable a man to chalk out his own life in the manner he likes best."

Once this premise is adopted, it follows as a logical corollary, though not so specifically stated by the Chief Justice, that the rights of individual become beyond the reach of the State. Indeed,

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these are then anterior to the State and the *raison d'être* for the latter is the securing of enjoyment of these rights to every individual. The State then is not the grantor, but only the guarantor of these rights and so can have no legitimate right to abridge or abrogate them.

This philosophical premise which was, in the eighteenth century and the first half of the nineteenth century, the foundation of the reigning political theories, is no more accepted as valid by eminent philosophers. Rights are not treated as the exclusive property of an individual. On the other hand, they are recognised to be essential conditions of a good social life. They exist only within a community and it is well recognised that their content and scope continues to change with the changing economic and cultural conditions of group life. Whatever rights there are in a society, belong "to the individuals" as Green put it, "as members of a society."<sup>1</sup> Their origin lies not only in the rational nature of man but also in his sociality. Indeed, it is only in a society consisting of individuals that the question of rights, fundamental or otherwise, arises. Consequently, rights owe their origin to organised society. In its absence there may be powers but there can be no rights.

But apart from the fact that in modern political theory the primordial character of fundamental rights is not accepted, it has to be seen whether the Constitution makers did proceed in their work on the basis of this philosophical premise. It is evident from the debates of the Constituent Assembly that no single philosophical premise determined the thinking of the Constituent Assembly. Consequently, our Constitution was drawn up as a result of a series of compromises between different, and sometimes conflicting, views. With due deference to the Court it would not be historically correct to impute to the Constitution makers the view that fundamental rights were primordial rights or that they had transcendental character and that the State could not but recognise and honour them in their entirety and which the future Parliament could not abridge or abrogate. Indeed, Shri T. T. Krishnamachari, one of the stalwarts of the drafting committee, speaking in the Constituent Assembly on November 25, 1949 expressed a wholly contrary view. He observed that "fundamental rights are intended only for the people who represent a certain class of persons usually called the vested interests. It is the vested interest that are afraid of the future Parliament elected on adult suffrage which might want to democratise, socialise and equalise the wealth and opportunity in the country. It is the vested interests that have to be afraid of the future."<sup>2</sup> It is obvious that he was not thinking of fundamental rights as inhering in the individual nor did he hold that these were beyond the reach of Parliament.

1. T. H. Green : *Principles of Political Obligation*, p. 143.

2. C. A. Deb (Constituent Assembly Debates), Vol. XI, No. II, p. 953.

He was not contradicted by any one in the Constituent Assembly and may be deemed to have voiced the sentiments of all the members at least in regard to the capability of the future Parliament to abridge or abrogate them.

Besides, there is intrinsic evidence in the Constitution itself that these fundamental rights were not treated to be the primordial rights of individuals. The heading to Part III is 'Fundamental Rights' and not 'Rights of Individuals'. Article 16 provides that "there *shall be* equality of opportunity for all citizens." Article 19 speaks of "All citizens shall have the right." It is obvious from the language that citizens who were originally bereft of these rights are being granted the same. The same fact emerges from the Preamble to the Constitution. It speaks of the People of India "having solemnly resolved to constitute India into a Sovereign Democratic Republic and to secure to all its citizens justice, liberty, equality and fraternity.....in our Constituent Assembly.....give to ourselves this Constitution."

The expression 'to secure to all its citizens justice, liberty, equality and fraternity' implies two things. In the first place it implies that the rights are a grant from the people of India. In the absence of that grant the individual as such could not be deemed to have any rights. In this connection, it is worth mentioning that the Preamble to our Constitution does not state, as do other declaration of rights, that all men are born free and equal. It only speaks of rights accruing to citizens of the Indian Republic by virtue of the Constitution given by the people of India.

It could not have been otherwise. Prior to the 15th August, 1947, it could not be said that individuals in India were enjoying any inherent rights. Whatever may have been the pretensions of individuals and groups, the unpalatable fact was that their liberty and opportunities were very much limited by the law of the land. Whatever rights they had were a grant to them by the law. Different political organisations were agitating to secure an enlargement of these rights by securing the grant of a liberal Constitution. In that process each political organisation drew up a charter of rights which it wanted to secure from the then British-over-lords, and termed the same as the inalienable rights of the Indian people. But in actual fact such rights were not available to the Indian subjects. It would not, therefore, be correct to hold that the Indian polity established in 1950 was established by individuals enjoying primordial rights prior to its establishment and that, therefore, the fundamental rights enshrined in Part III of the Constitution were natural rights of the individual which the State could not touch.

It is also evident from the existing provisions of the Constitution that the people of India acting in and through their Constituent Assembly did not hold that the rights they were granting to Indian citizens were to be absolute in character under all circumstances. On the contrary, the people speaking through their Constituent Assembly were fully conscious of the fact that in certain circumstances the grant of rights would remain suspended (article 358) and in the case of a certain specified category of citizens these rights could be 'restricted or abrogated' (article 33). Moreover, they were fully conscious that for the realisation of specified objects, such as the security and integrity of the State, reasonable restrictions may have to be imposed by Law on the rights granted (article 19, clauses 2 to 6) and exceptions may have to be made in favour of weaker sections of the Indian people in the matter of some other rights. Thus they did not provide for a scheme of absolute individual rights. Conscious as they were of the respective claims of the community and individual citizens, they drew up a scheme which in their opinion could secure harmony between different and differing claims. Indeed, they were fully conscious that in actual practice one kind of freedom may conflict with another kind of freedom. They had before them the history of the freedom of contract which had resulted in the cruellest possible exploitation of the working classes. They were, therefore, seeking to balance the different freedoms and rights in such a fashion that the evils associated with absolute freedoms or rights may not arise in our country. Indeed, by including a chapter on the directive principles of State policy they sought to minimise the evils which had flowed from the concept of absolute rights of individuals in the hey-day of *laissez faire* individualism. The entire Part IV of the Constitution is an eloquent evidence of their consciousness that a continuous process of adjustment would be necessary if the rights granted under Part III were not to result in un contemplated and unforeseen tyrannies.

The speeches made by the members of Drafting Committee in the Constituent Assembly also emphasise this fact. In replying to the different kinds of criticism advanced by some members of the Constituent Assembly, Dr. Ambedkar, the Chairman of the Drafting Committee observed as follows:

Jefferson, the great American statesman, who played so great a part in the making of the American Constitution, has expressed some very weighty views which the makers of the Constitution can never afford to ignore. In one place he has said, 'we may consider each generation a distinct nation with a right, by the will of the majority, to bind themselves, but none to bind the succeeding generation more than the inhabitants of another country.' In another place

he has said, 'The idea that institutions established for the use of the nation cannot be touched or modified, even to make them answer their end, because of rights gratuitously supposed in those employed to manage them in trust for the public, may perhaps be a salutary provision against the abuses of a monarch, but is most absurd against the nation itself. Yet our lawyers and priests generally inculcate the doctrine and suppose that preceding generations held the earth more freely than we do, had a right to impose laws on us, unalterable by ourselves and that *we*, in the like manner, *can make laws and impose burdens on future generations which they will have no right to alter; in fine, that the earth belongs to the dead and not to the living.*' I admit that what Jefferson has said is not merely true but is absolutely true..... *The Assembly has not only refrained from putting the seal of finality and infallibility on this Constitution... but has provided a most facile procedure for amending the Constitution.*<sup>3</sup>

In the light of this consciousness of the need for adjustment of the scheme of fundamental rights to the changing economic, cultural and political conditions of the Indian people, would it be unreasonable to assume that they did not and could not make the scheme of rights contained in Part III of the Constitution a thing beyond the power of the people of India acting through their recognised agency, namely the Parliament. In any case, it would not be unreasonable to hold that the scheme of the rights enshrined in the said part is not and was not contemplated to be immutable. With due deference to the court it does not appear that the philosophical premise on which its judgement has proceeded to some extent at least is necessarily sustained by the facts of the situation.

The court has, however, come to its conclusion as to the immutability of fundamental rights mainly because it has, contrary to its opinion in *Shankari Prasad's* case as also in *Sajjan Singh's* case, come to form in this case an opinion by a majority of six to five that the process of amending the Constitution is a legislative process and that the product of that process is 'law' as defined in article 13(2). That article provides that "The state shall not make any law which takes away or abridges the rights conferred by this part and any law in contravention of this clause shall, to the extent of the contravention, be void," and since the expression State under article 12 is defined to include Parliament, it held that if any constitutional amendment made under article 368, abridges or abrogates any of the rights contained in Part III it shall be void to the extent of contravention.

3. *C. A. Deb.*, Vol. XI, No. II, pp. 975-76.



The reasons why the majority has held that the amending process of the Constitution is nothing but legislative process are two-fold in character. In the first place it has held in this case that the power to amend the Constitution is not conferred by article 368. The Chief Justice observed that "the article in terms only prescribes various procedural steps in the manner of amendment, it shall be initiated by the introduction of a bill in either House of Parliament, it shall be passed by the prescribed majority in both the Houses; it shall then be presented to the President for his assent, and upon such assent the Constitution shall stand amended. The article assumes the power to amend found elsewhere and says that it shall be exercised in the manner laid down therein." He brushed aside the contention that the expression 'the constitution shall stand amended' indicated that power to amend was immanent in article 368 itself as 'subtle but unconvincing.' "The contention that the power to amend was an implied power to be inferred from article 363 or from the nature of the articles sought to be amended" was also rejected by his lordship on the ground that "the doctrine of necessary implication cannot be invoked if there is an express provision or unless but for such implication of the article will become otiose and nugatory." The Chief Justice added that there is no necessity to imply such power, as *Parliament has the plenary power to make any law, including the law to amend the Constitution subject to the limitations laid down therein.* He finds that this power is conferred by article 245 read with article 248 and entry 97 in the list I of Schedule VII to the Constitution. Article 245 provides that 'subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India.' Article 248 provides that 'Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.' Entry 97 in the list I runs as follows: "Any other matter not enumerated in List II or III including any tax not mentioned in either of those Lists". In short, the Chief Justice holds that the power to amend the Constitution, though not specifically mentioned in any of the aforesaid articles, must be deemed to be a residuary power falling within the exclusive domain of the Parliament by virtue of these articles and entry 97 on the ground that it is as much a law as any other law is. With due deference to his lordship he adopts as a premise what had been sought to be proved to be the truth. If it is already assumed that constitutional amendment is a law like any other law, then there remains no reason to establish that there is no distinction between constitutional amendment and ordinary legislation. But this is the crux of the problem. Is constitutional amendment to be taken to be included in the term law as defined by article 13(2)? Should it be taken for granted that the makers of the Constitution were not influenced by foreign theories in regard to

the distinction made between organic law and law simpliciter? It would appear from a perusal of the articles of the Constitution that they maintained a distinction between a mere law and the Constitution. A constitutional amendment becomes an integral part of the constitution and as such is constitution itself. Consequently, if they had wished to include constitutional amendment in the definition of the term law in article 13(2) they could have included in it a constitution amendment as well. They did not and rightly so because no Constitution and no part of the Constitution could be made immune to changes essential to make it suitable to the changing conditions of group life. Besides, in this connection, it is worthwhile to draw attention to the well established fact that the clause relating to residuary power is inserted in constitutions containing enumeration of the various political entities established by the constitution makers in order to provide for a contingency which is not within their knowledge at the time they are drawing up the constitution and which may not be foreseen and imagined by them. Indeed, for matters which are within their knowledge and for which they have made provisions, the residuary power is never intended. In this connection, the observations of Shri Krishnamachari, one of the main architects of the Constitution, have relevance. Speaking in the Constituent Assembly on November 25, 1949, he observed:

In my mind there seems to be the possibility of only one power that has not been enumerated, which might *be exercised in the future by means of the use of residuary power*, namely the capital levy on agricultural land. This power has not been assigned either to the Centre or to the Units.<sup>4</sup>

Thus in his view all other powers including the power of amendment had been provided for by the Constitution specifically. Indeed, could it be said that the Constitution makers were not conscious of the necessity of the amendment of the Constitution to suit it to the changing conditions of life? Obviously not. From the extract of the speech of Dr. Ambedkar given above it is abundantly clear that the architects of the Constitution were fully aware that they could not bind all the future generations by the Constitution drawn up by them and that for that reason they had made provision for its amendment in the Constitution itself. If they were doing so, then it would not be reasonable to assume that in the part exclusively devoted by them to the subject of amendment they contented themselves with laying down the procedure only and did not confer the power to amend. By the very fact that a wholly distinct part was devoted to the amendment of the Constitution, it is obvious that it was

4. C. A. Deb., Vol. XI, No. 11, p. 953.

intended to deal exclusively with the power and procedure of amendment. If they had not intended to give constitutional amendment a distinct status they could well have added a provision to article 100, providing for a special majority for any question relating to constitutional amendments. In this connection, the observation of Dr. Ambedkar in his speech in the Constituent Assembly on November 25, 1949 to the effect that "The Assembly has not only refrained from putting a seal of finality and infallibility upon this Constitution by denying the people the right to amend the Constitution" is significant though not conclusive. It would appear from this remark that the right to amend the Constitution had been granted by the Constitution itself. Dr. Ambedkar, no doubt, speaks of the people having this right. But the people speaking through their Constituent Assembly had by the Constitution given to themselves, spoken that this right was to be exercised by them in accordance with the procedure laid down in article 368, that is to say through the Parliament. In this connection, attention may be drawn to the further observation of Dr. Ambedkar while amplifying the remark relating to the right of the people to amend the Constitution. He said that the Assembly:

has provided a most facile procedure for amending the Constitution. I challenge any of the critics of the Constitution to prove that any Constituent Assembly anywhere in the world has, in the circumstances in which the country finds itself, provided such a facile procedure for the amendment of the Constitution. Those who are dissatisfied with this Constitution have only to obtain a 2/3rd majority to amend it.

It may be inferred, therefore, that in making this observation he was contemplating not only the procedure to amend but also the right and power to amend, which he at least felt had been put in Part XX of the Constitution. Whatever had been stated earlier by him is obviously superseded by this final speech made by him after the Constitution had been fully drawn up. This view finds further support from what Shri T. T. Krishnamachari stated in the Constituent Assembly on November 25, 1949. He observed:

I agree that the best point is the *amending power*.....and in regard to the matters covered by the Constitution the *amending power rests with the Centre*.

It may, therefore, be inferred that the Constitution makers did intend to grant the power of amendment and lay down the procedure by Part XX of the Constitution itself, which was exclusively devoted to the subject of amendment. It may also be inferred that when they were specifically making provision for this matter they could not have intended it to fall

within entry 97 in list I of Schedule VII to the Constitution or to be covered by article 243 read with article 245.

Have they made this intention clear from the terms employed in couching article 368? With due deference to the Court they have. In the first place the expression "*passed* in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting" indicates that each House has the power of passing or rejecting the Bill introduced for amending the Constitution. A Bill to amend the Constitution may be introduced in an unauthorised body, but since it has no authority it cannot be passed by it so as to have any effect. It is only when the concerned body has the power to pass the Bill that its act of passing the Bill can have any effect in law.

It is obvious from the use of the expression "when passed" that what was intended was that the Bill to have any effect, each of the Houses must have exercised the power of duly considering it and approving it with or without changes. Besides, as Justice Wanchoo observes, the use of the expression "the Constitution shall stand amended in accordance with the terms of the Bill", indicates the grant of power to the Parliament to amend *the Constitution*.

Indeed, if it had been intended that the constitutional amendment should be put on the same footing as ordinary law, then there was nothing to prevent the Constituent Assembly from adding a clause to article 245 to the effect that the Parliament may make laws to amend the Constitution in accordance with the procedure laid down in article 368. If the Constituent Assembly had intended to lay down only the procedure to amend the Constitution in its part XX, then conscious as they were of the necessity of amendment, they would have made such a provision for granting the power to amend by law the Constitution rather let it be inferred from the articles and clauses relating to residuary powers. In that case there would have been no necessity to add the expression "subject to the provisions of this Constitution" to the clause relating to the amendment of the Constitution for any law made by the Parliament under that provision would have been void if it were inconsistent with the provisions of article 13(2).

If article 245 (1) were intended to grant the power of making laws to amend the Constitution, then it would appear to be clumsily worded because it commences with the expression "Subject to the provisions of this Constitution". As already stated, this expression would not be requisite to attract the provisions of article 13 (2) to any law amending the Constitution which was inconsistent to the former. It has not been so far held that the law amending the Constitution cannot amend the other

parts of the Constitution. So the opening words of article 245 could have significance only if they applied to ordinary law. They have no significance whatever in relation to the amendment of the Constitution. Indeed, as pointed out by His Lordship Justice Wanchoo the use of the above mentioned expression indicates that constitutional amendments were not intended to be covered by it. With due deference to the opinion of the majority of the Court, it would appear that article 368 grants the power to amend and lays down the procedure to be followed.

The second reason which has weighed with the majority of the Court in holding that a constitutional amendment is law within the meaning of article 13(2) is that the amending process is the legislative process as laid down by the Constitution and the product of that process can be nothing but law. The Chief Justice observes that "the amendment can be initiated by the introduction of a Bill, it shall be passed by two Houses; it shall receive the assent of the President." These are well-known procedural steps in the process of law making. Indeed, this court in *Shankari Prasad's* case brought out this idea in clear terms. It said, "In the first place it is provided that the amendment must be initiated by the introduction of a Bill in either House of Parliament, a familiar feature of parliamentary procedure [*cf.* article 107(1) which says a Bill may originate in either House of Parliament]. Then the Bill must be passed in each House—just what the Parliament does when it is called upon to exercise the normal legislative function [article 107 (2) ]; and finally the Bill thus passed must be presented to the President for his assent—again a parliamentary process through which every Bill must pass before it can reach the Statute Book [article 111]. We thus find that each of the component units of Parliament is to play its allotted part in bringing about an amendment to the Constitution. The Chief Justice observes in *Golaknath's* case that:

If amendment is intended to be something other than law, the constitutional insistence on the said legislative process is unnecessary. In short amendment cannot be made otherwise than by following the legislative process..... The imposition of further conditions is only a safeguard against hasty action or a protection to the States, but does not change the legislative character of the amendment.

He proceeds to reinforce this conclusion by reference to articles 3 and 169 and para 7 of the 5th Schedule and para 21 of the Sixth Schedule to the Constitution which provide for alterations to be effected in the Constitution. These amendments, the Chief Justice observed, "under the said provisions can be made by the Union Parliament by simple majority." Such amendment is law made by the legislative process and that but for the fiction introduced it would attract article 368. That some amend-

ment require a special majority does not change the character of the process by which they are made. The Chief Justice, therefore, concludes:

that amendment either under article 368 or under other articles are made only by Parliament by following the legislative process adopted by it in making other law. In the premises an amendment of the Constitution can be nothing but law.

It may be submitted with due respect that the court in *Shankari Prasad's* case did not definitively state that the process prescribed under article 368 was not distinct from the ordinary legislative process. The court only brought out the parallelism between the two processes but did not pronounce them to be identical. That the two processes are not identical is evident from the fact that there is no provision for the resolution of differences between the two Houses of Parliament on a Bill in so far as a Bill amending the Constitution is concerned. In the case of Bills, not dealing with the amendment of the Constitution, such differences must be resolved by the holding of a joint session of the two Houses under article 108. This difference makes a vital distinction between the simple legislative process and the process for constitutional amendment. In the case of a simple law, the will of majority in the joint session of the two Houses prevails. In other words the House of the People can, in certain circumstances, get its will made into a binding law even though a majority in the Council of States were opposed to it. But in the case of the constitutional amendment such cannot be the case. It is true that in 1951 the Provisional Parliament passed the Constitution (1st amendment) Act even when it consisted of one House only. But it did so on account of the adaptation made in article 368. If that adaptation had not been made, it could not have acted even though it was, in a sense, a successor body of the Constituent Assembly. The fact is that as article 368 stands today it provides for a process which though parallel in certain respects to the legislative process is also different from it in at least one vital respect. It does not permit even a contingent supremacy of the House of the People in the matter of constitutional amendments. It is not a distinction without any substance. This distinction gives to the Council of States an equal status with the House of People which the former does not have in relation to ordinary bills because in the latter case it is possible that on account of its smaller numerical strength it would be possible for a majority of the House of People to override the Council's opposition to an ordinary bill.

Besides, it is clear from the scheme of the Constitution that some changes therein have not been given by the Constitution makers the character of a constitutional amendment. The fact that these changes can be effected by simple legislative process does not go to prove that the

process of the constitutional amendment is nothing but purely and simply a legislative process. The fact that the adoption of the simple legislative process is not adequate for effecting a constitutional amendment is clearly emphasised by the specific provision that such changes are not to be deemed to be amendments of the Constitution. The Constitution makers felt that certain changes of minor importance should be left to be dealt with by the Parliament qua legislature. But in the case of other changes they felt that the Parliament should act as a constituent body so that the attention of the people may get drawn to the amendments proposed in the Constitution and their opinion may have its effect on the deliberations of the Constitution amending body. In this connection, attention may be drawn to the dual role which the Constituent Assembly itself had. It was drawing up a Constitution for India and was also acting as a legislative assembly for passing laws for the country. Indeed, when sitting as a legislature it could not have even by a unanimous voting made a single constitutional provision while it did make constitutional provisions by simple majority when sitting as a Constitution making body. Authorities on constitutional law and practice recognise that the same body can have different functions to perform. These may be constituent, legislative, financial or in some cases executive in character. The Parliament in our country performs both legislative and financial functions. It stands, therefore, to reason that in inserting part XX in the Constitution, the Constituent Assembly gave the role of the Constituent Body to the Parliament in so far as amendments to the Constitution were concerned, and laid down a special procedure to be followed by the Parliament when acting as a constituent body. Indeed, the difference of phraseology between the article which lays down the legislative procedure and article 368 indicates that the Constitution makers did not treat the latter as a mere legislative process. Article 368 does not say that the President shall declare either that he assents to the Bill or that he withholds assent therefrom, nor does it give a power to the President to return Bill relating to constitutional amendment to the Houses with a message recommending any amendments therein. It is, therefore, a moot point whether the President would have the right to withhold assent, once a bill proposing an amendment to the Constitution and passed by two Houses of Parliament, is presented to him for assent. It may be stated that article 368 not only provides for a special majority, but also introduces differences in the respective positions of the different limbs of Parliament in the matter of having a say in regard to constitutional amendments. Consequently, the two processes are distinct from each other.

ment it would be void, but if it passes the same Bill by giving the appellation of constitutional amendment by a mere two-thirds majority it would, if the view that the process prescribed under article 368 is not legislative process were to be accepted, be quite valid. The Court feels that the Constitution makers could not be deemed to have intended to create such an anomaly. In this connection, however, it is submitted with due deference that if viewed in the light of the two capacities of the Parliament it does not appear in fact to be an anomaly. It is well known that the same attention is not given to a mere legislative measure as is given by the people to an amendment proposed in the Constitution. So the appellation of a Bill has its own significance from the viewpoint of the coming into play of public opinion in regard to the measure on the anvil. Besides, a different capacity makes a vital distinction. If all the members of a legislative body sitting as a committee take a decision, then it does not become the decision of the House as such. But a decision by mere majority taken in the House is a decision of the House. It is the capacity in which a body acts that is material. Article 368 gives the Parliament the capacity of a constituent body in the matter of effecting amendments, and as such they can do by a two-thirds majority what the same body in a different capacity may not be able to do by an unanimous vote. This would be evident from the converse case in which a change in the Constitution were to be made under article 4(1) by a unanimous vote of the two Houses of the legislature. Even if that were so, it would not acquire the status of an amendment to the Constitution even though a 2/3rd majority is required for a constitutional amendment under article 368.

Finally, it has to be kept in view that the language used in article 368 is unqualified. It does not exclude from its purview Part III which relates to fundamental rights. If it had been the intention of the Constitution makers that the fundamental rights should be placed beyond the reach of the Parliament, they could well have added a second proviso to that article making this intention clear. In regard to certain provisions the Constitution makers held that the States had a vested interest in them, and consequently, they made a provision that no change should be made *in them unless a majority of States consented to that change*. All the entrenched provisions specified in article 368 are those in which States have vested interest. This is true in regard to the constitutional provisions relating to the Supreme Court and the High Courts. States have as much vested interest in them as the Union can have. Indeed, one of the essential factors which make possible the establishment of a federation is the establishment of an impartial judiciary to adjudicate in all matters which arise between the Union and the constituent units. So States insist that they must have a say in every constitutional provision affecting the judiciary. Such consent of the States is helpful in the continued maintenance of the Union.



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One other consideration which has weighed with the Court is that if Parliament passes a bill abridging or abrogating fundamental rights unanimously without giving it the appellation of a constitutional amend-

effective as the same reasoning would apply against that Assembly actions as the Court has applied against those of the Parliament. It would also be a constituted body and could not have greater powers than the constituent body namely the Parliament itself. A way out is, therefore, needed so that peaceful progress in the economic and social order could be ensured.

The maintenance of the Union is an objective of supreme importance for on its maintenance depend all the benefits that accrue to the citizens of India. It is an objective for which restrictions may be legally placed on the rights of the citizens and for which they may be asked to risk their lives. In comparison to this object, the rights of individual citizens have only secondary importance. The Constitution makers very naturally added a proviso to article 368 to ensure special protection to all the provisions in which the States had a vested interest. Indeed, if they had not done so, they would have permitted the Union unilaterally to effect a change in the relations established by the Constitution between the Union and the States, even in the teeth of the opposition of the latter. But that would have created the danger of the Union breaking up. The Constitution makers have guarded against this danger by means of the proviso to article 368.

But the Constitution makers did not and could not give the fundamental rights a higher status than they had given to the provisions having a bearing on the continuance and permanence of the Union. These rights could be suspended or abrogated as occasion demanded without any risk to the continued existence of the body politic. So they did not entrench them against a constitutional amendment. It was considered by the Constitution makers that these rights would be sufficiently safeguarded if they were entrenched against the day-to-day legislation or executive actions of the governmental authorities. But they did not entrench them against a constitutional amendment for the simple reason that in the social and economic circumstances prevailing in the country it was inevitable that the State may take action to abrogate at least one of the fundamental rights in order to make it possible for the vast majority of Indian citizens to enjoy a fuller, and a more dignified, life than what was already available to them. Indeed, most of the constitutional amendments have been in relation to the right of the property which as Justice Hidayatullah concedes is the weakest right. They have been passed with the object of abolishing the economic inequities that afflict the present day Indian society. The Constitution makers intended as is evident from the 'Directive Principles of State Policy' that the State must take steps to prevent concentration of wealth and for an equitable distribution of the same amongst Indian citizens. This is what the various constitutional amendments have sought to achieve. By giving however, the fundamental right, including the right of property, the character of immutability, and placing them beyond the reach of the Parliament, the Court has in effect made itself the protector of the vested interests and has in a way blocked the path of the social order being changed by constitutional means. The remedy suggested by the Court, namely, the convening of a Constituent Assembly under an Act of Parliament can hardly be

how the world shall be governed, or who shall govern it; and therefore all such clauses, acts or declarations by which the makers of them attempt to do on what they have neither the right nor the power to do, nor take power to execute, are in themselves null and void. Every age and generation must be as free to act for itself in all cases as the ages and generations which preceded it. The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has any generation a property in the generations which are to follow. The Parliament of the people of 1668 or of any other period, had no more right to dispose of the people of the present day, or to bind or control them in any shape whatever, than the Parliament or the people of the present day have to dispose of, bind or control those who are to live a hundred or a thousand years hence.

Same were the views expressed by the Framers of our Constitution when the relevant provisions of the Draft Constitution were being considered in the Constituent Assembly. Dr. Ambedkar, while speaking in the Constituent Assembly on November 25, 1949 said:

The assembly has not only refrained from putting a seal of finality and infallibility upon this Constitution by denying to the people the right to amend the Constitution as in Canada or by making the amendment of the Constitution subject to the fulfilment of extraordinary terms and conditions as in America or in Australia, but has provided a most facile procedure for amending the Constitution. I challenge any of the critics of the Constitution to prove that any Constituent Assembly anywhere in the world has, in the circumstances in which this country finds itself, provided such a facile procedure for the amendment of the Constitution.

Pandit Jawahar Lal Nehru speaking in the Constituent Assembly in this regard said:

And remember this that while we want this Constitution to be as solid and as permanent a structure as we can make it, nevertheless, there is no permanence in Constitutions. There should be a certain flexibility. If you make anything rigid and permanent, you stop a Nation's growth, the growth of living vital organic people. Therefore, it has to be flexible.

Another reason for having a power of amendment in a Constitution is that the amending power operates as a safety valve to enable the Constitution to be adjusted to the changing requirements of the society peacefully and to prevent the overthrow of the Government and destruc-

## *Parliament's Power to amend Fundamental Rights*

•N. C. CHATTERJEE, M.P.†

THIS CONVENTION ON the Constitution has been convened to discuss the subject of fundamental rights and constitutional amendment. The necessity of this Convention arises due to the recent Judgment of the Supreme Court in *Golak Nath's* case, wherein the Supreme Court considered the scope of the power of amendment with special reference to the amendment of the fundamental rights in Part III of the Constitution. The decision of the Supreme Court in *Golak Nath's* case has given rise to an impression that Parliament has no power to amend the fundamental rights contained in Part III of the Constitution. A Private Member's Bill to clarify the position and to declare that power of amendment extends to all the provisions of the Constitution including the fundamental rights has been referred to a Select Committee. Therefore, we should deal with the decision of the Supreme Court in *Golak Nath's* case and the Bill pending in Parliament for amending article 368 of the Constitution. I would like to point out the importance of the power of amendment in a 'Written Constitution'.

It has been said that an unamendable constitution is a contradiction in terms and that the doctrine of amendability of the constitution is grounded on the doctrine of sovereignty of the people. Any restriction on the power of amendment of a constitution impinges upon the sovereignty of the people.

Thomas Paine writing in 1791, on the Rights of Man, said:

There never did, there never will, and there never can, exist a Parliament, or any description of men or any generation of men, in any country, possessed of right or the power of binding and controlling posterity to the 'end of time' or of commanding for ever

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Having considered the importance of the power of amending the Constitution, and having pointed out that fundamental rights are not so sacrosanct as to be above the said power of amendment, I will now analyse the Judgment of the Supreme Court in *Golak Nath's* case.

Before *Golak Nath's* case the Supreme Court had considered the scope of the power to amend the Constitution. In two earlier cases, it had held that the power conferred under Article 368 of the Constitution was wide enough to include the power to amend the fundamental rights contained in Part III of the Constitution. In *Golak Nath's* case the view of the Supreme Court may be analysed as under:

- (i) Five learned judges (Wanchoo, Bhargava, Mitter, Bachawat, and Ramaswamy) held that the power of amendment of the Constitution conferred by article 368 is unqualified and absolute.
- (ii) Five learned judges (Subba Rao C.J., Shah, Sikri, Shelat and Vaidialingam JJ) held that article 368 does not confer any power of the amendments of the Constitution, but only lays down the procedure for such an amendment. The power to amend the Constitution is contained in the Residuary Clause (Article 248, Entry 97 of List I) read with Article 245 of the Constitution. They, therefore, held that every amendment of the Constitution is a law and is subject to article 13 and Parliament cannot amend any other fundamental right contained in Part III.
- (iii) One learned judge (Hidayatullah J.) has said that the fundamental rights are outside the amendatory process if the amendment seeks to abridge or take away any of the rights. According to him it is a mistake to put the right to property as a fundamental right in Article 31 and that it was put there under the dead hand of Sec. 299 of the Government of India Act, and that the power of amendment does not fall in any of the three legislative lists, but is *sui generis*.

The aforesaid analysis of the various judgements in *Golak Nath's* case will show that there is no clear cut majority for the view expressed by Chief Justice Subba Rao, or the view expressed by Wanchoo J. and other Judges supporting him.

I may point out some of the fallacies in the Judgments of the Chief Justice Subba Rao. In my view the basic error in the approach of learned Chief Justice is that he has eliminated the well known distinction between the constituent power and legislative power. The constituent power is a power which is above the Constitution and not subject to limitations in the legislation. The legislative power, on the other hand, is always sub-

tion of the whole Constitution by a revolution. Chief Justice Subba Rao, speaking for himself and four other learned Judges of the Supreme Court, seems to proceed on the basis that enforcement of the provisions of the Constitution can never bring about a revolution and that history shows that revolutions are brought about not by majorities but by the minorities and sometime by military coup. I fail to understand the reason of the learned Chief Justice. In my view the situation can arise when as a result of the changing social conditions the provisions of Constitution which were framed under a particular set of conditions may become so unjust as to operate inequitably against a major section of the population of the country forcing them to revolt against such a Constitution and to ask for a new Constitution more suited to the changed social conditions. History shows that revolutions take place when the laws fail to keep pace with the changing social conditions and enforcement of the said law leads to injustice and oppression.

Having pointed out the importance of power of amendment in a written Constitution, I would now examine the question whether there is anything in the Chapter relating to fundamental rights which should be so sacrosanct as to be beyond the power of amendment.

Fundamental rights are rights which the State has chosen to confer on its citizens to enable a smooth and proper functioning of the State organization and to preventing justice or oppression which may in the end lead to revolutionary stage. The object of the Government is, however, to fulfil the obligations cast on them under Part IV of the Constitution relating to 'Directive Principles of State Policy'. One can visualize that fundamental rights of the individual may operate as an impediment or a fetter in the path of State to fulfil its obligations under Chapter IV of the Constitution and in that event it may become necessary to amend the provisions of the fundamental rights to enable the State to discharge its obligations. Any denial of power to amend the fundamental rights in such a situation may lead to economic and social inequalities which may assume such a proportion as to endanger the whole Constitution. As an illustration, I may point out that in order to improve the economic conditions of the masses of this country the State may have to resort to measures for the abolition of monopolies, nationalisation of various industries, acquisition of property for social purposes, as slum clearance, and the State may not be in a position to pay full compensation to the person whose property has been taken away. In that event, unless the right to property guaranteed under article 31 of the Constitution is not suitably amended, it may not be possible for the State to carry out its policies and to achieve economic and social equality which is the basic postulate of our Constitution.

I agree with Mr. Seervai that it is difficult on principles to understand how if a freely elected Parliament cannot be trusted to amend Part III as provided by article 368, another body set up by the same Parliament can acquire higher authority.

Thus, a Constituent Assembly is either legally impossible or wholly unnecessary.

Therefore, the position should be authoritatively clarified and in my humble submission there should be a reference to Supreme Court under article 143 for a final and authoritative clarification of the debatable issue as to whether Parliament can amend the fundamental rights.

### ANNEXURE†

I have carefully analysed the implications of the recent judgment of the Supreme Court on the Seventeenth Amendment in *Golak Nath v. State of Punjab* of February 27, 1967. A sharply divided Court by a slender majority of one has declared that Parliament will have no power from the date of decision to take away or abridge a fundamental right even by an amendment of the Constitution. The inevitable consequence is that this decision has paralysed the Parliament to make suitable amendments in case amendments are at all considered necessary after the emergency is lifted.

It must be remembered that during the period of emergency the enforcement of fundamental rights alone was suspended. The violations of fundamental rights during the period of emergency were not valid. The State and its officers, therefore, continued to be liable for their unconstitutional acts. Once the emergency is withdrawn suits for damages and complaints for criminal action for breach of fundamental rights during emergency can be filed in Courts by persons whose fundamental rights had been violated. This is the view taken by Chief Justice Gajendragadkar, presiding over the Constitution Bench in the *DIR* case.

When the demand for lifting the emergency was gaining momentum the constitutional pundits had advised your Government to amend the Constitution to provide for indemnity for violation of fundamental rights because a mere suspension of the remedy for the enforcement of fundamental rights during the emergency did not take away the illegality of the violations of these rights.

Now that the emergency has continued for over four years the State has increased its liability by the continued violation of fundamental rights. If the judgement is good law, Parliament is powerless to exercise its amending power to provide for indemnity to get rid of this liability and we

† Copy of the letter presented to the President of India, Dr. S. Radhakrishnan by Shri N. C. Chatterjee, M. P. on 3/4-3-1967.



ject to the limitations which are imposed by the various provisions of the Constitution. The result of putting the power of amendment in the legislative power under article 248 read with Entry 97 of List I would be that every amendment of the Constitution would be unconstitutional and void because, the legislative power is always subject to the provisions of the Constitution and law amending the Constitution is bound to be inconsistent with the provisions of the Constitution as it stood on the date of the amendment.

I agree with Mr. Seervai in his expressions in his recent book on the Constitutional Law of India<sup>1</sup> that:

- (i) it is necessary to express the final opinion whether Part III can be legally amended;
- (ii) power to amend the Constitution cannot be a residuary power of legislation contained in Entry 97 of List I;
- (iii) the significance of article 368 and the great importance in Federal Constitution of the proviso in that article has been overlooked in the Judgment of Subba Rao C. J. and the Judges following him;
- (iv) Subba Rao C. J. is mistaken in holding that no Constitution providing for amendment contained a clause like article 13(2)<sup>2</sup>;
- (v) The theory of prospective invalidity means that a Judge makes a law in a modern dynamic society;
- (vi) Chief Justice Subba Rao's judgment and the Judgment of other Judges who supported him deny to a sovereign people the right of amendment of the Constitution and to its Parliament. No Judiciary can hold up the will of the people. The Judgment of the majority requires reconsideration.

Whereas Subba Rao C. J. and other Judges who agree with him have taken the view that there is no power to amend the fundamental rights at all, Justice Hidayatullah seems to have taken the view that Parliament may make a law for convoking a Constituent Assembly and that Assembly may amend the fundamental rights. The objection to the said view is that by resorting to such a procedure, Parliament will be doing indirectly what it cannot do directly and that is not permissible in law. Secondly, I think that the Constituent Assembly established under a law made by Parliament would be an 'Authority' and therefore 'State' within the meaning of the article 12 of the Constitution and amendments made by the Constituent Assembly would equally be void under article 13(2).

1. See Seervai, S.M., *Constitutional Law of India—A Critical Commentary*, 1967.  
 2. See Constitution of Ceylon, Sec. 29 (3).

by the Judges who constituted the majority that the concept of fundamental rights is susceptible to undergo revolutionary changes. Justice Hidayatullah has indeed underlined the dynamic character of fundamental rights.

The tentative opinion of the Chief Justice and Justice Hidayatullah that a law can be made by Parliament convoking a Constituent Assembly radically to alter the fundamental rights are open to serious objections on grounds of logic and jurisprudence. The Chief Justice has rightly given this opinion with express reservations that he was not making a final pronouncement on this question. If Parliament cannot directly take away or abridge a fundamental right how can it authorise its agent to do so merely by calling it a 'Constituent Assembly'. The so-called Constituent Assembly created under a law made by Parliament will only be a constituted body created by another constituted body and cannot be raised to the status of a Constituent Assembly.

But without finding an articulate mode of the exercise of sovereignty of the people, how could the power to amend the Constitution recognised by article 368 be put under a restraint is a question which must be answered. I am inviting Your attention to serious questions of far reaching importance for the future of this country in the hope that you would take suitable steps immediately so that emergency is not continued for ever on the plea that the Government cannot expose itself to actions in Courts of law, and immediately ways and means are found to put the sovereign power to amend beyond doubt. For this you may consider a reference to the Supreme Court for an authoritative pronouncement on the mode available for amendment of the fundamental rights if ever amendment becomes necessary. The tentative opinions of the Chief Justice and Justice Hidayatullah that a law can be made by Parliament in exercise of its residuary powers under entry 97 in List I convoking a Constituent Assembly radically to alter the fundamental rights are open to serious objections on grounds of logic and jurisprudence. The Chief Justice has rightly given this opinion with express reservations that he was not making a final pronouncement whether that could be done. One is tempted to ask: If Parliament cannot directly take away or abridge a fundamental right how can it create an agent precisely to do what Parliament is forbidden to do. Merely calling its agent a 'Constituent Assembly' would not do. The so-called Constituent Assembly created under a law made by Parliament would again be a mere constituted body created by another constituted body and it cannot claim the status of a Constituent Assembly with powers to create or recreate a Constitution. A better reading of article 368 is that our Parliament, in addition to its Legislative function, was also constituted a constituent body perpetually in operation to keep

feel apprehensive that the Government is likely to use it as a pretext needlessly to prolong the continued existence of the proclamation of emergency which has long since lost its validity.

It must not be understood that Parliament will condone all wrongs and crimes resulting out of violation of fundamental rights during emergency. But that is not to say an absolute power of amendment even in respect of fundamental rights can be denied to a sovereign nation. Situations can well be conceived when fighting against a powerful enemy over a long number of years the citizens of this country lost their liberty, life and property by inevitable acts of the State which were not consistent with their fundamental rights, enforcement of which had been made unenforceable during the period of emergency. In such situations the sovereign power to amend the Constitution must be available to the nation so that this nation may decide justly the extent of the liability it can honour and get rid of the liability which it finds impossible to honour on a fair democratic judgment by a sovereign body. The case of the present emergency stands on a different footing altogether. The then Law Minister had gone on record to assure the country that this nation was solvent enough to pay full damages for violation of fundamental rights during the period of emergency.

The citizen has thus been exposed to the risk of Your Government continuing the proclamation of emergency on the ground that the Government is afraid of exposing itself to a large number of action in Civil and Criminal Courts.

No doubt the citizen is entitled to his fundamental rights being respected but he wants his sovereignty too. The sovereignty of this nation has been put under a restraint on a novel reading of our Constitution at variance with the unanimous view taken by the Supreme Court in *Shankari Prasad's* case.

The country must have some means of getting rid of the drastic consequences of such a view if its result is going to be that emergency can be continued for ever because unless Constituent Assembly is convened and sovereign power is recreated there can be no amendment of fundamental rights which comes in conflict with article 13(2). The country cannot wait that long for emergency to be lifted.

This is an impossible situation. I demand that emergency must be lifted immediately and steps be taken forthwith to put the sovereignty of this nation on surer foundations. To deny the power to amend the Constitution even in respect of "two dozen articles" in the Constitution is to deny sovereignty to the people of India. The people of India will rightly feel shocked that their love of fundamental rights has cost them their sovereignty. The people of India could not have intended to give themselves fundamental rights with no power to alter them in future. It is not denied even

## *Discrimination Perpetuated— A Consequence of Golak Nath's Case*

•B. ERRABBIT†

THE RECENT PRONOUNCEMENT of the Supreme Court in *Golak Nath v. State of Punjab* has taken many by surprise though for quite a few it is a welcome decision. The most important thing about this decision is that unlike the earlier decisions, it has attracted the attention of the whole country. As the issues involved in this case are many I propose to confine myself to one aspect, namely, the effect of this decision on the capacity of Parliament to implement the economic ideals set out in article 39(b) and (c) of the Constitution.

Seventeen years after the commencement of the Constitution the Supreme Court has chosen to declare that Parliament has no power to amend the fundamental rights. This declaration will have far-reaching effect on the competency of Parliament to implement the provisions of Part IV of the Constitution. The constitutional goal of economic justice set out in the Preamble is worked out in detail in Part IV of the Constitution. Article 39, *inter-alia*, enjoins the State to direct its policy towards securing prevention of concentration of wealth and means of production, and utilisation of the material resources of the community for the common good. As against these directives, the Constitution has guaranteed to every citizen the right to acquire, hold and dispose of property subject to reasonable restrictions which may be imposed by the State by law in the interest of the general public.<sup>1</sup> Further, in order to secure social and economic justice to all its people the state is given the right to acquire the property of the individuals subject to certain safeguards guaranteed by the Constitution.<sup>2</sup> However, this power of the State is limited by article 13(2) which states that the State shall not make any law abridging or taking away any of the fundamental rights. Thus, it may be seen that on the one hand the

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1. See Art. 19(1) (f).

2. See Art. 31.

the Constitution alive and absorb all necessary changes. That is the view taken by five Judges who differed with the majority.

Without finding an articulate mode of the exercise of sovereignty of the people, how can the power to amend the Constitution recognised by article 368 be put under any restraint is a question which must be answered? I am inviting your attention to serious questions of far-reaching importance for the future of our dynamic democracy in this country. I hope that you would take suitable steps immediately so that emergency is lifted and not continued on that plea that the Government cannot expose itself to actions in courts of law. Ways and means must be found to put the sovereign power to amend the Constitution in all its common omnipotence beyond doubt. For this you may seriously consider a reference to the Supreme Court for an authoritative pronouncement on the machinery available for the amendment of the fundamental rights, if ever amendment becomes necessary.

To my mind the Supreme Court has made no answer to this paramount question, which must be answered if we are to survive as a Sovereign Democratic Republic under the Constitution solemnly adopted by the people of India.

between the Judiciary and Parliament and that this decision of the Supreme Court in *Golak Nath's* case is the culmination of this long drawn tussle. Not long ago, the Supreme Court in *Wajrazelu's* case<sup>4</sup> examined the question of compensation in the light of 4th amendment only to declare that even after 4th amendment the State shall have to pay the market value of the property at or about the time of its acquisition. It is needless to say that this interpretation of the 4th amendment would render it redundant. If the attitude of the judiciary towards the right to property is not modified so as to allow Parliament to have free play within the permissible limits set out in Part III, it would be impossible to achieve the constitutional goal of economic justice set out by the Preamble and Part IV of the Constitution. The judiciary should have to modify its pattern of interpretation of the right to property. It will be better if the Supreme Court discards the dogmatic rules of statutory construction while interpreting constitutional provisions. Many of the amendments would have been avoided had the Judiciary taken into consideration the intentions of the Framers of the Constitution. On the contrary, as the history of the three amendments shows, the judiciary has been trying to frustrate the intentions of the Framers especially with regard to the Directive Principles.

As Hidayatullah J. expressed in *Golak Nath's* case everything would have been well had the Supreme Court construed article 31 differently. It should have shown the same liberality to the right to property as is shown to the right to liberty guaranteed under article 21 of the Constitution. After all, property comes only next to liberty in the hierarchy of fundamental rights.

Coming to the basic question, can the discrimination between land owners whose property is liable for acquisition under article 31-A without the payment of compensation and other property owners, ever be removed within the existing framework of Part III without amending any of the fundamental rights? I submit that this will not be possible within the existing framework unless article 31 is again amended. But in view of *Golak Nath's* case an amendment to article 31 will not be possible. Hence the only solution to this problem is to accept the amending power of Parliament in the Constitution as interpreted in *Shankari Prasad's* case.<sup>5</sup> Short of amendment of article 31 or 31-A, it will not be possible to remove the disparity between land owners and other property owners. At best, this disparity can only be reduced to its minimum provided the Supreme Court reconsiders its decision in *Wajrazelu's* case in future.

4. A. I. R. 1965, S. C. 1017.

5. A.I.R. 1951 S.C. 458.

State is enjoined to implement certain socio-economic values in Part IV, on the other hand, the State is prohibited from taking away or abridging the right to property. Realising that within this scheme of the provisions of the Constitution it would not be possible to implement effectively the economic ideals laid down in article 39, Parliament has, on more than one occasion, taken refuge under article 368 to amend the right to property guaranteed under article 31 so as to bring it in tune with its agrarian reforms legislation. It is a matter of common knowledge that Parliament has been too busy in carrying out agrarian reforms to pay any attention to the other economic reforms such as acquisition by the State of urban and industrial properties for public benefit. As a result of this, today, there is an unfair differentiation between land owners and other property owners. While landed property can be acquired by the State under article 31-A without paying any compensation the other property, i.e., urban and industrial property can only be acquired under article 31(2) on payment of full market value of the property 'at or about' the time of its acquisition.

An immediate consequence of the decision of the Supreme Court in *Golak Nath's* case is that the discriminatory treatment meted out to the land owners in the Constitution in the course of its working is perpetuated. So long as this decision is binding Parliament cannot have the power to amend either article 31 or 31-A. It will have to give effect to the goal of economic justice only within the framework of Part III of the Constitution. In this context the basic question which I would like to submit is, can it be possible for Parliament to bring about legislative reforms with respect to urban industrial property in future without amending either article 31 or 31-A? This question was in effect, answered in the affirmative by Subba Rao, C. J. in *Golak Nath's* case. He observed that "the Directive Principles of State Policy can reasonably be enforced without taking or abridging fundamental rights." Does this observation testify the past history of the 19 years of the working of the Constitution? If Part IV could be implemented without touching fundamental rights, what was the necessity for the enactment of the three amendments that have been brought about in the area of the right to property? Is the Parliament solely responsible for bringing out these amendments or is the Judiciary also equally responsible for these amendments? I submit that the past Constitutional History would make it absolutely clear that all the three amendments, i.e., 1st, 4th and 17th amendments, have been brought about only because of the Supreme Court's unacceptable interpretation of articles 31 and 31-A.<sup>3</sup> The history of the circumstances which led to the passing of the three amendments would make one feel that there is a constant tussle going on

3. *State of West Bengal v. Bella Banerjee*; A. I. R. 1954, S. C. 170 and *State of West Bengal v. Subodh Gopal*; A. I. R. 1954, S. C. 92 etc.

The fundamental rights may now be grouped in three categories:

*First*, rights such as those expressed in article 19 (freedom of speech, association, assembly, residence, movement within the Territory of the Union, and vocation etc.) in which the States' rights to impose restrictions on the exercise of the rights conferred is already provided for. In the same category may be placed rights to life and personal liberty under article 21, subject to procedure established by law. Thus, to hang black-marketeers in Chandni Chowk would only need an amendment of the Criminal Procedure Code and the Penal Code.

*Second*, rights in regard to which there have been abridgements by Constitution Amendment Acts, which were held valid by erstwhile decisions relate primarily to rights to property abridged in the pursuit of an alleged, but presently inchoate, social order.

*Third*, rights which fall outside the above two categories, such as equality before the law (article 14), prohibition of discrimination on the ground only of religion, race, caste etc. (article 15); abolition of untouchability (article 17); equal opportunities in matters of public employment (article 16); freedom of conscience and freedom to profess, practice and propagate any religion (article 25); prohibition of traffic in human beings and forced labour (article 23); and rights of minorities to conserve their distinct language and culture of their own (article 29); and to administer educational institutions of their choice (article 30).

It is well to bear in mind that the rights classified as fundamental and falling within the third category above mentioned, in regard to which there is no express provision for abridgement or repeal, fall generally within the ambit of the "Universal Declaration of Human Rights" and correspond in particular to the rights declared in articles 1, 2, 3, 5, 7, 9, 13, 18, 19, 20, 21, 22 and 29 of the Declaration, which was adopted by the General Assembly of the United Nations and to which adoption India was a party. Some of the rights relating to minorities also fall within the guarantees contained in the 'Genocide Convention', an international treaty subscribed to by over sixty nations including India. Both the "Declaration of Human Rights" and the "Genocide Convention" preceded the adoption of the Constitution in November, 1949, and the Constitution must be read in the terms of the qualifications to 'absolute sovereignty' voluntarily surrendered by a free India, to enable her to sit in the comity of civilised nations and could not be unilaterally denounced without exciting international issues.

It is also well to recall that one of the first acts of the Constituent Assembly was to adopt unanimously, or near unanimously, the new virtually forgotten "Objectives Resolution" of December 13, 1946, which



## *Amendment of the Constitution and Constituent Chaos*

•K. L. GAUBAT

IN CERTAIN QUARTERS, the recent pronouncements of the Supreme Court on Fundamental Rights appear to have raised problems more urgent than the drought in Bihar or rice stocks in Kerala. The judgments in the *Golak Nath* case were barely a few hours old, when a ubiquitous member of Parliament secured time from the Prime Minister to explain to her the "catastrophic" implications of the decisions and to suggest an immediate Presidential Reference under article 143 of the Constitution to the Supreme Court to explain itself. Only the problem of finding a President to make the Reference, had for the time being deferred the matter.

Public interest appears to be concerned with: (1) the validity or feasibility of the alternative forms of amendment of fundamental rights that are implied in the judgments, viz., a Constituent Assembly; (2) whether article 368 of the Constitution could be amended to clarify that Parliament may amend the Constitution so as even to abridge or take away a fundamental right; and (3) whether the issues should be reconsidered by the Court itself on a Presidential Reference under article 143?

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In any case where a remedy is sought, one must be certain as to for what purpose it is needed, otherwise the cure may prove worse than the malady. Significantly in the debate as to the merits of the respective courses open, none of the protagonists of one or other suggested course, has been able to specify a specific objective. Thus, before there could be a Presidential Reference, the President in the first place, and the Supreme Court thereafter, would need to know as to what particular fundamental right or rights it was proposed to abridge or take away: thus the pursuit of the directive principles towards a new social order may not call for the abridgement or repeal of the prohibition of traffic in human beings and forced labour or the freedom of conscience, and belief.

† Senior Advocate, Supreme Court.

fearsome chaos than if all the zoos in the country were unlocked simultaneously.

A Constituent Assembly would have to be convened. If so, by what agency or by whom? Parliament in exercise of its residuary powers? But in the light of the Supreme Court decision, Parliament is a "Constituted Body" as distinct from a "Constituent Body". How could a body without requisite power invest another body with powers greater than it possesses? So it seems evident that Parliament cannot set up a Constituent Assembly. Who else could convene one?

The President? But the President himself is a creature of the Constitution and pledged to maintain it. How could he, consistent with his oath of office, bring into being a body charged to find a new Constitution or to radically change the existing one? Incidentally the question of their respective oaths to uphold the Constitution would apply to every member of Parliament, and every Minister of whatever rank, and also every State Legislature in the country. Before a new Constituent Assembly could be convened or function a lot of persons would have to be released from their oaths and solemn undertakings.

It is, therefore, difficult to see how a Constituent Assembly can be called unless we are prepared to seek an answer from the recent history of Latin America, or perhaps from our next door neighbours, who have not done too badly by scrapping one constitution for another.

No doubt, those who perceive the difficulties of a new Constituent Assembly and yet would like to get rid of the hurdles now in the way of the abridgement of fundamental rights, would settle for a less perilous voyage—a return to the Supreme Court riding a Presidential Reference under article 143 of the Constitution.

A reference under Article 143 has also its own shortcomings:

(1) It is very doubtful whether opinions expressed on a reference under article 143 could override a decision of the Court given under article 141 read with article 145 (5) of the Constitution.

(2) To over-rule a decision of a Bench of 11 judges, it would be necessary to constitute a larger Bench and 13 is the next number. There may be even a few Judges, whose views may overrule them in the matter of sitting in a Bench of 13.

(3) The personnel of the Supreme Court is presently eleven. It may not be difficult to find two more, but what is the guarantee that the new incumbents will dissent from the *Golak Nath* case. When President Roosevelt found his 'Fair Deal' floundering in the Supreme Court of the

its sponsor Prime Minister Nehru, declared as embodying rights and safeguards of the liberties of the citizen and of the minorities, eternal in character and as an act of faith with posterity.

There is, thus, good meaning why Part III of the Constitution, embodying the rights declared as fundamental rights, did not find a place in article 368, and its several provisions relating to amendments of the Constitution, some requiring only a two-thirds majority and others a ratification by the States as well (generally referred to as the 'entrenched' provisions). Fundamental rights, especially those of a "universal" or "eternal" character were, it appears, deliberately omitted from article 368, in order to preserve such rights as equality before the law, and the abolition of untouchability etc., not merely for a time but for all time. Any amendment, therefore, of article 368 to include "Fundamental Rights" within the general procedure for amendment would be contrary to article 13 (2) and would be void.

The five Justices, constituting the Minority, in the *Golak Nath* case did not speculate on the means by which the provisions in Part III of the Constitution could be amended as, in their opinion, article 368 not only includes the process but also the power to abridge or take away any of the fundamental rights. Six of the eleven Judges, however, took a contrary view, which is undoubtedly the right view. In the view of the majority, the only process by which fundamental rights can be abridged or withdrawn is by a Constituent Assembly convened for the purpose, which in any event would be for "an extremely unforeseeable and extravagant demand", and if such a contingency should arise, "the residuary power of Parliament may be relied upon to call for a Constituent Assembly for making a new Constitution or radically changing it."

To convene a Constituent Assembly is easier said than done. The last Constituent Assembly was a product of British ingenuity. The members elected to the Central and Provincial Legislatures under the Government of India Act 1935, under the 1945 elections became the Constituent Assemblies for India and Pakistan under the Indian Independence Act, 1947, an Act of the British Parliament. To convene a Constituent Assembly now charged with the duty of framing a new Constitution or radically changing the present one would be in itself a problem of great difficulty. In a country, where illiteracy is still with more than 85 per cent of the people, and millions are still in prevedic civilisation, a referendum in any form, direct or by specific mandate to specially chosen representatives would be forbidding. Even if such an assembly could be brought together, the problems in framing a new Constitution or radically changing the present, would be staggering and would perhaps make for more

## *Implications of the Golak Nath Case*

•G. S. V. IYER†

**I**N SHANKARI PRASAD'S case no arguments were advanced to the effect that the power to amend the Constitution is not contained in article 368, on the other hand it was taken for granted that article 368 not only indicated the procedure for an amendment of the Constitution but also provided the power to do so. It was also categorically decided that this power was not hit by the limitations contained in article 13(2) on the ground that the word 'law' used there referred only to law made in exercise of legislative power and did not include an amendment of the Constitution made in exercise of Constituent Power.

In *Sajjan Singh's* case the question whether article 368 contains power to amend the Constitution was not raised at all but the judges proceeded to consider the matter for the reason that they were dealt with in *Shankari Prasad's* case. The Chief Justice for himself and two others expressed complete agreement with the reasoning and the conclusions in *Shankari Prasad's* case. Hidayatullah and Mudholkar JJ. doubted if the power to amend was to be found in article 368 at all. They also inclined to the view that wherever the power may be found its use was limited by the prohibitions contained in article 13(2), but they refrained from giving any final opinion.

In *Golak Nath and other v. State of Punjab* (writ petition 163 of 1966 and two other writ petitions in which common judgments were delivered) the Supreme Court had to consider the question of the validity of the Constitution (Seventeenth Amendment) Act, 1966. In order to do so, the Court had to examine the scope of article 368 of the Constitution which relates to the amendment of the Constitution and ascertain if this article contained both the power to amend as well as the procedure for doing so or only the latter, the power itself having to be sought for elsewhere. The question of article 13 (2) in relation to the interpretation of article 368 also required to be determined.

† Former Secretary, Mysore Legislative Assembly.

United States, he made a number of appointments known to support his policies, only to find to his regret that when lawyers go to the Bench they act as Judges and not as politicians.

In the light of the above, the *Golak Nath* case, at any rate, for the present has but one answer, often applied in the Courts to decisions less deserving. Expressed in two words, in the language beloved of the erudite in law—'*stare decisis*.'

They said: "But we are relieved of the necessity to express our opinion on this all important question; so far as fundamental rights are concerned the question raised can be answered on a narrower basis. This question may arise for consideration only if Parliament seeks to destroy the structure of the Constitution embodied on the provisions other than Part III of the Constitution. We do not, therefore, propose to express our opinion in that regard." (Subba Rao, Chief Justice). This judgement is also silent on the question whether fundamental rights can be enlarged, but it would appear that it would not, according to the judgement, be objectionable to do so.

One judge has stated that subject to the provisions of article 13 (2), that is, so long as fundamental rights are not abrogated or abridged the whole Constitution is open to amendment (Hidayatullah J.).

The only conclusion that can be drawn from these decisions is therefore, that Parliament can amend any part of the Constitution including fundamental rights subject to the limitation that no amendment Act can abridge or take away fundamental rights.

### 3. Prospective Overruling

This doctrine introduced into our country for the first time has had the approval of only five out of 11 judges (Subba Rao C.J. etc.). Hidayatullah J., who reached the same conclusion as the majority on the validity of the amendment Acts passed so far, based it, not on prospective overruling but on the theory of acquiescence. The other five judges refused to offer any opinion on this point.

It cannot be said, therefore, that this doctrine of prospective overruling has found favour with a majority of the judges. This doctrine cannot be said to have found final acceptance with the Supreme Court.

### 4. Possible Lines of Action

From the above resume it follows that only short point falls to be determined. This is the power of Parliament to amend fundamental rights, the effect of which would be to abridge or take away all or any of these fundamental rights. This question, it has to be remembered, is not one of the desirability or necessity for such action but the question is whether such a power which was considered available till now and is now held not to exist, should be given to Parliament.

If it is considered that Parliament in the interest of individual fundamental rights, should not have the power to abridge or take all or any of them away. Then the matter could be allowed to rest where it is after the judgement. If, on the other hand, it is considered necessary for the



The decision of the Court was not unanimous and in all five judgements were delivered. From these 5 judgements it would be necessary to ascertain the more important points of agreement and disagreement. Under article 145(5) the judgement of the Court is that of the majority and in order to ascertain what are the matters with respect to which majority has taken a particular view, such an examination becomes necessary.

## 1. Power to Amend

Five Judges have categorically stated, that article 368 confers unfettered power on the Parliament to amend every article of the Constitution subject to procedure outlined there being followed (minority judgement).

Five other judges have stated that the power of parliament to amend is derived from articles 245, 246 and 248 of the Constitution and not from article 368 which only dealt with procedure (Subba Rao, Chief Justice). One judge (Hidayatullah J.) has observed as follows:

As stated by me in *Sajjan Singh's* case article 368 outlines process, which if followed strictly results in the amendment of the Constitution. The article gives power to no particular person or persons. All the named authorities have to act according to the letter of the article to achieve the result. The procedure of amendment if it can be called a power at all is a legislative power but is *sui generis* and outside the three lists of Schedule Seven of the Constitution. It does not have to depend upon any entry in the lists.

It would appear to follow from the above remarks that by whatever name called, once the process outlined in article 368 is followed an amendment can result.

It may not be incorrect, therefore, to conclude that the power to amend according to a majority is to be found in article 368 and by following the procedure set out therein. Since this has been the view accepted by the Supreme Court in earlier decisions, *Golak Nath's* case cannot be said to have made any departure.

## 2. Ambit of Power of Amendment

Five judges of the Court have held that the power under article 368 is unfettered by either express or implied limitations (minority judgements)

Five other judges have observed that the power to amend is subject to the restrictions contained in article 13 (2). But on the wider question whether the power can or cannot be used to amend or even destroy the basic structure of the Constitution, they would not express any opinion.

tional but it, nevertheless, deserves consideration, as a number of text book writers have offered this solution as admitted by Hidayatullah J. According to his method the first step is to amend article 368 so as to make it clear beyond doubt that it not only contains the procedure for amendment but also the power to amend each and every article of the Constitution. Such an amendment act will not be hit by the judgement in *Golak Nath's* case, as it would not result in abridgement or taking away of any fundamental rights. The Constitution, as thus amended, would be a perfectly valid and operative one.

The next step is to amend Part III if and when considered necessary, even if such amendment results in an abridgement or abrogation of any fundamental right. Being action taken under a Constitution (*i.e.*, as amended by the first step above mentioned) which is valid and operative the second, amendment act, would also not be hit by *Golak Nath's* case. For one thing the Constitution before the courts in this case would be one quite different from what was considered in *Golak Nath's* case; and secondly, two validly enacted amendment acts cannot by their joint operation render the whole transaction unconstitutional or void. What is constitutional in its several parts cannot become unconstitutional when considered jointly. It would in any case give the Supreme Court another opportunity to re-examine the whole issue, because as noticed above, decisions have been taken on a very slender majority and apart from the one question of amendability of fundamental rights, resulting in their abridgement or abrogation, all the other decisions taken may be considered by and large, to be unobjectionable.

Yet another method would be to refer the matter again to the Supreme Court under article 143 of the Constitution but, such a step appears inappropriate when whole Court has very recently considered the matter in detail.

public good that Parliament should have the power then the matter will have to be examined in some details.

On this point, this is in case it is considered necessary to vest this power in Parliament, six judges have suggested the setting up of a Constituent Assembly, which could make the necessary changes in the Constitution. Of these six, five have not expressed a final opinion but merely stated the possibility of such a procedure. Only one judge (Hidayatullah J.) has definitely stated that this is the only way to make an amendment which would result in abridging or taking away fundamental rights.

In this connection it may be relevant to consider the objections to such a course pointed out by some of the judges delivering the minority judgements.

Ramaswami J. observed: "It was suggested for the petitioners that an alteration of fundamental rights could be made by convening a new Constituent Assembly outside the framework of the present Constitution, but it is doubtful if the proceedings of the new Constituent Assembly will have any legal validity for the reason that if the Constitution provides for its own method of amendment, any other method of amendment of the Constitution will be unconstitutional and void."

Bachawat J. said: "If Parliament cannot amend Part III of the Constitution even by recourse to article 368, no other power can do so. There is no provision in the Constitution for calling a convention for its revision or for submission of any proposal for amendment to the referendum. Even if power to call a convention or submit a proposal to the referendum be taken by amendment of article 368, Part III would still remain unamendable on the assumption that a constitutional amendment is a law."

Mr. H.M. Seervai in his book<sup>1</sup> has the following to say on this subject:

"If a law made by Parliament to amend Part III in the exercise of its residuary power and in compliance with article 368 is void as contravening article 13(2) a law passed by the same Parliament convening a Constituent Assembly and authorising it to do that very thing must be equally void. For what Parliament cannot do itself, it cannot authorise another body to do. Therefore a Constituent Assembly is either legally impossible or wholly unnecessary."

Another course which could be adopted is the two step amendment. No doubt, Hidayatullah J. has said that this method would be unconstitu-

1. See Seervai, *op. cit.*, p. 1109.

## Harmful Move

Mr. Nath Pai is a barrister, familiar with the unwritten Constitution of England. He does not realise the harmful effect that the reversal of the Supreme Court's recent judgment will have on the citizens' fundamental rights and liberties, which are already greatly modified in the Constitution itself, presumably in public interest. As a matter of fact, we see that most of our fundamental rights have been more or less taken away by the Defence of India Act. In England, Parliament is sovereign. It is said that it can do everything except turn a man into a woman and *vice versa*. Parliament there can legislate on any subject; its rights are not limited.

As a matter of fact, in England, there is no such thing as constitutional law. All laws are of equal value. However, by convention, certain laws are considered as constitutional. For instance, the *Habeas Corpus* Act and the Bill of Rights are so considered and no Parliament would venture to change them, even though it has the right and the power to do so. England has a Unitary Constitution, where the three main branches of Government—Legislature, Judiciary and Executive—are not totally separated. Whatever division of powers there is among them, is regulated by long-standing conventions. For instance, Parliament would not legislate, except under very special circumstances, against any judgment of the Privy Council.

In India, we have, like the U.S.A., a written Constitution. It is a Federal Constitution, where the rights of the Central Government and of the States are more or less defined. This limits the sovereign power of our Parliament. Further, our Constitution seeks to keep separate, so far as it is possible, the functions of the Legislature, the Judiciary and the Executive. The Supreme Court has the power to declare any law passed by Parliament or any order issued by the Executive to be *ultra vires* of the Constitution. This means that the Supreme Court can limit the powers of the Executive as well as the legislature for the time being at least. In common man's language, it means that though Parliament, the Judiciary and the Executive appear to be supreme, yet, in practice, they are not so. They limit one another's authority.

## Majority not always Right

So far as the citizens' fundamental rights are concerned, as I have already said, they find a place in a separate chapter of our Constitution. Article 13(2) lays down, "The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void". 'Law', as defined in article 13(2), (a) 'includes any ordinance,

## *Fundamental Rights†*

•J. B. KRIPALANI, M.P.

THE SUPREME COURT recently delivered a majority judgment which declared that Parliament could not change, even through a constitutional amendment, the fundamental rights of the citizen, guaranteed to him in our Constitution. In the past, whenever the Supreme Court delivered a judgment which went contrary to the wishes or the whims of those in power, they changed the law through a constitutional amendment.

This time, it is not the Government, but a member of the Opposition who wants a review of the Supreme Court's majority judgment. Mr. Nath Pai recently brought a non-official resolution asking for the appointment of a Parliamentary Committee to review the situation created by the majority judgment. The tenor of his speech was that the majority judgment was wrong, in as much as it denied to Parliament the right to amend any of the provisions of the chapter in our Constitution dealing with fundamental rights.

I am no lawyer. I can speak only in the language of the common man. My only justification to write on this subject is that I was the Chairman of the Fundamental Rights Committee, appointed by the Constituent Assembly. As Chairman, I pointed out to my colleagues that the idea of fundamental rights was hedged in by provisos which in effect, nullified the idea underlying it. Whether it was freedom of speech or association or conscience or any other freedom, it could not to-day be enjoyed by the citizen without some modification, which takes away from the absolute character given to it by 18th century philosophers. However, my colleagues were more idealistic than myself. The fundamental rights were, therefore, incorporated in a separate chapter of the Constitution. The idea was that they could not be changed or abrogated by the authority of the legislature or of the executive.

† Reproduced from *The Hindu* of the 26th July, 1967, by permission of the Editor of *The Hindu*, Madras.

alone. Moreover, today democracy is not merely the rule of the majority, it also implies that due regard be given to minority opinion.

Our founding fathers considered that the fundamental rights of the citizens and their sacred character went to the very roots of democracy, which not only protects the individual but also minority groups. These rights are based upon moral and spiritual concepts. They rank as eternal verities. For instance, freedom of conscience is one of the highest spiritual and moral principles. In that category would also come freedom of expression, association, etc. If these were to be left to the mercy of shifting majorities, the citizen would be left without protection in respect of what he considers to be fundamental to his very being. A person in that case will have to deny his humanity and sell his soul if he yielded to the wishes of the majority against his moral sense or his awakened conscience. In a democracy, it would be unjust to put the citizen in such a position, where he has to deny his humanity or slavishly to submit to the will of the majority. It is the perverse will of the majority that has often resulted in the martyrdom of man.

### Property Rights

Of course, it is unfortunate that in our Constitution, property rights are also included in the fundamental rights chapter. It is rightly said that with the times, the ideas of what is fundamental may change and the Constitution that does not recognise this fact would be defective from that point of view. However, except for property rights, every other right is of a nature where there can be no change with the passage of time; for instance, freedom of conscience, expression or association.

Let us now look at the history of these fundamental rights. It goes as far back as ancient Greece. The philosophers, especially the Stoics, held that there were certain moral principles inherent in human nature. These constituted what they called the laws of nature. They should be followed by all human beings in their conduct in society. When the Romans conquered many lands, they saw that legal and customary rules and regulations of different countries were in many ways similar. Therefore, such laws were called as *Jus gentium*. They were more or less of universal application. These laws came to be identified with the laws of nature of the Stoics. Under Christianity, these general laws of almost universal application came to be recognised as the essence of the 'Moral Law'.

Eighteenth century philosophers, believing as they did in the theory of social contract, held that human beings have some inherent rights and governments are created to see that these rights are guaranteed to the people. They too identified these inherent rights with the law of nature

order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law; (b) 'laws in force' include laws passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution.

There is reason for keeping the fundamental rights of the citizens beyond the pale of the authority of the Legislature and of the Executive. So far as the Legislature is concerned, it passes its laws through a majority of votes. It is true that our Constitution, like every written Constitution, makes the procedure for amending it a little more elaborate, yet it is the majority of the legislators who decide whether a constitutional change is called for or not. The majority in the legislatures can be and is sometimes affected by the prevailing passions and prejudices of the day. It may also be that a charismatic leader may sway the legislature to his way of thinking. It is possible for such a leader to get any legislation, however pernicious, to be passed by Parliament through the prescribed majority. It was through perverting the democratic procedure that Hitler and Mussolini came to power. Having assumed power, they dispensed with the legislatures even as Cromwell and Napoleon had done before them. Our founding fathers were alive to such dangers. They did not, therefore, place the fundamental rights of the citizen at the mercy of even the Legislature. It is because of this that they are called 'Fundamental' and put in a separate chapter.

Dr. Ambedkar, who in a sense drafted our Constitution, could not have had a very exalted opinion of the majorities. He knew that his community had been oppressed and suppressed for centuries by the so-called higher castes, who were in a majority. If the removal of untouchability had been left to the will of the majority in the Legislature, it may never have been possible to abolish it in India, before Gandhiji created a powerful opinion against it. If reform of the Hindu Code had been left to the majority opinion of the Hindu community, it would never have been effected. Today, if the question of the abolition of polygamy were to be left to the general vote of the Muslim community, it cannot be abolished, however desirable it may be under present circumstances.

There are many customs among religious groups in India and elsewhere which need reform; but the majority stands against these reforms and, therefore, they cannot be brought about and the reformer feels helpless. In history, all reforms have been made possible through the efforts of gifted individuals or advanced minorities. If the initiative of the individual reformer was to be pitched against the majority at a particular time, no reform or reformer would have any chance of success. The reformer and the revolutionary have very often to plough lone furrows. They have always to resist the passions and prejudices of the majority. They walk

## *The Amending Power and Parts III and IV of the Constitution*

●S. MOHAN KUMARAMANGALAM†

WIDESPREAD DISCUSSION HAS developed over the decision of the Supreme Court in *Golaknath's* case. This is welcome because it shows the very active interest taken by thousands of people in our country in matters of such high political and constitutional importance. It is a living testimony to the character and content of Indian democracy.

In some quarters this decision has been hailed as "epoch making", as marking a milestone in the defence of fundamental right; in others, equally authoritative and responsible, it has been sharply criticised as "clearly wrong" and "productive of the greatest public mischief".

The issues at stake in the discussion are many and vital. I propose, however, to confine myself to one very important aspect; namely, the scope and effect of the decision from the point of view of the relationship between Part III of the Constitution (Fundamental Rights) and Part IV (Directive Principles of State Policy). To my mind it is difficult if not impossible, to achieve clarity and proper understanding of the real fundamental underlying the decision in *Golaknath's* case unless the relationship between these two important parts of the Constitution are seen. Now Part III contains the "rights reserved by the people to themselves"; to quote from Kania C.J. in *Gopalan's* case:

It is true to say that, in a sense the people delegated to the legislative, executive and the judicial organs of the State their respective powers while reserving to themselves the fundamental rights which they made paramount by providing that the State shall not make any law which takes away or abridges the rights conferred by that part. To this extent the Indian Constitution may be said to have

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1. See Seervai, *op. cit.*, p. 117.



of the ancients. They have, therefore, acquired sanctity. Any abrogation of these by the legislature would amount to the repudiation of democracy, which itself is based on justice, fair play, equality, non-violence and humanity, i. e., the fundamentals of the moral law. Our Constitution-makers, therefore, passed, as it were, a self-denying ordinance, when they kept them beyond the pale of the Legislature in a category apart.

### **Supreme Court is Right**

I, therefore, agree with the majority judgment of the Supreme Court in holding that by no constitutional amendment can the fundamental rights guaranteed to the citizen be amended or abrogated. I know the two previous Supreme Court judgments on this point, which go against the present majority decision of the Supreme Court. These two judgments referred only to property rights. Now that these have been modified, so that the Parliament can bring in any reform in property relations in consonance with changed ideas in the matter, there is no need for further tampering with the fundamental rights. In this respect the recent Supreme Court judgment has not in any way disturbed the two previous judgments.

I, therefore, hold that the present judgment is more in consonance with the intentions of our founding fathers. I can say this, because I was a member of the Constituent Assembly and, as I have already said, was also the Chairman of the Fundamental Rights Committee appointed by it. But it is not the intention of the Legislature that counts or should count in interpreting a law. It is the language used that has to be interpreted. The language of article 13 (2) is very clear and should be considered as conclusive. This is what the majority decision of the Supreme Court has done this time.

I have already said that nowadays even in democratic constitutions the fundamental rights of the citizen are strictly limited by 'provisos'. This takes away from their absoluteness as conceived in former times. To allow the legislature or the executive to modify them further would almost be to nullify them and will be sacrilegious.

fundamental rights of liberty, the most important of all fundamental rights, would have a far more solid and wider content than it is today.

But that is not the question in point when we consider the decision in *Golaknath's* case because what is at stake was not article 19 but article 31. It is a question of the right of property. And I cannot but express my agreement with the view expressed by Hidayatullah J. in *Golaknath's* case that article 31 has no place in the chapter on fundamental rights.\* History has shown that the right to property cannot be placed in the same class as the other fundamental rights like the right to liberty, to free speech, association, freedom of press etc. And hence the logic of the argument against permitting the article protecting property to have any place in the Chapter on Fundamental Rights.

The problem of the relationship between directive principles and fundamental rights is not a new one. In *State of Madras v. Champakam Dorairajan*, the Supreme Court was first compelled to face up this problem. In that case Champakam Dorairajan challenged the validity of the communal G.O. by which candidates for seats in Medical Colleges in Madras were to be selected on a communal basis. She challenged its validity on the ground that it contravened article 29 (2) of the Constitution, which runs as follows:

29. (2) "No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

The Advocate-General of Madras in answer attempted to rely on the provisions of article 46 which runs as follows:

46. "Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections :—The State shall promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

The Supreme Court, in dealing with this contention, observed as follows:

The directive principles of the State policy which by Article 37 are expressly made unenforceable by the Court cannot override the provisions found in Part III which, notwithstanding other provisions,

3. See also article by J.B.Kripalani in *The Hindu*, of 26.7.1957 where he comments that "It is unfortunate that in our Constitution, property rights are also included in the fundamental rights chapter."

- been based on the American model, but this is far from making the principle of separation of powers as interpreted by the American courts, an essential part of the Indian Constitution or making the Indian Legislatures the delegates of the people so as to attract the application of the maxim.<sup>2</sup>

Now, clearly these rights are of the greatest importance for the citizen. The Framers of our Constitution understood their importance. Hence not merely did they provide for the existence of those rights but unlike the American Constitution, they have made provision for their enforceability. Articles 226 and 32 of the Constitution are in a sense unique. They confer the right of the citizen directly to approach the High Court and Supreme Court for the protection of fundamental rights. Thus, any citizen whose fundamental rights are affected does not have to go through the long delaying process of the ordinary law. In contrast he is given an avenue straight to the High Court and this enables the grant of both speedy and effective relief if the Court finds that his fundamental rights have been violated.

I emphasise this the more because in recent experience there has been considerable comment on the delays in the administration of justice. Much of this criticism is justified. But at the same time, it has to be acknowledged that the Constitution-makers have provided a speedy remedy in so far as really vital and important applications under article 226 are concerned where violation of fundamental rights are alleged. And in practice the courts have found a way of treating the matter as urgent and disposing of it at an early date.

I emphasise the importance of fundamental rights all the more because of my disagreement with the view not taken by the majority in *Golaknath's* case. It has become not uncommon for the supporters of the majority view in *Golaknath's* case to put themselves forward as the most ardent defenders of fundamental rights whereas its critics are denounced as persons who want to whittle down rights of the citizen and add to the scope of power of the State to interfere with the rights of the citizen. That, however, is not my approach. In contrast, I believe that it is necessary to show the most profound respect for fundamental rights and to fight tooth and nail for their protection and enforcement. Hence, it is that I have always been among those who consider it as unfortunate that the Supreme Court took the view it did in *A.K. Gopalan's* case thereby to a large extent limited the scope of article 19(1) (a) and (b) and (c) and articles 21 and 22 of the Constitution. Had the Supreme Court taken a more liberal view of the matter then surely the

2. 1950 S. C. R. 85 at 100.

traditionally known as 'natural rights'. As one author puts: "they are moral rights which every human being everywhere at all times ought to have simply because of the fact that in contradistinction with other beings, he is rational and moral." They are the primordial rights necessary for the development of the human personality. They are the rights which enable a man to chalk out his own life in the manner he likes best.

But to the problem of what happens when these two parts of the Constitution came into conflict, namely, if in attempting to implement the directive principles in Part IV, the law made by Parliament came into conflict with Part III, his answer is to avoid the problem. Here is the passage:

It will, therefore, be seen that fundamental rights are given a transcendental position under our Constitution and are kept beyond the reach of Parliament. At the same time Parts III and IV constituted an integrated scheme is made so elastic that all the Directive Principles of State Policy can reasonably be enforced without taking away or abridging the fundamental rights.

But this approach of Subba Rao C.J., with all respect, is an approach of evasion. I say this because the history of the last 19 years of the working of Constitution provides not a few examples of the directive principles and the fundamental rights coming into conflict one with the other. *Champakam Dorairajan's* case was the first of these cases. And it led to the first amendment Act which introduced article 15(4) into Constitution.

The same first amendment Act also amended article 31 as a consequence of the decision of the Patna High Court which struck down the Zamindari Abolition Act of Bihar in the *State of Bihar v. Maharajadhiraj Shri Kameshwar Singh*<sup>7</sup>. Subba Rao C.J. appeared to think that the Constitution-makers envisaged a situation when the Directive Principles of State Policy can be reasonably enforced without abridging the fundamental rights. That may have been the hope of the makers of the Constitution but in actual practice that hope became incapable of realisation. And it is important to remember that the Constitution (First Amendment) Act was passed by the provisional Parliament composed of the very members who formed the Constituent Assembly and adopted the Constitution on behalf of the people.

The fourth amendment was rendered necessary by the decision of Supreme Court in *State of West Bengal v. Mrs. Bela Banerji*.<sup>8</sup> This

7. A.I.R. 1951 Patna 91.

8. 1954 S.C.R. 587.

are expressly made enforceable by appropriate Writs, Orders or directions under article 32. The chapter of Fundamental Rights is sacrosanct and not liable to be abridged by any Legislative or Executive act or order, except to the extent provided in the appropriate article in Part III. The directive principles of State policy have to confer to and run as subsidiary to the Chapter of Fundamental Rights. In our opinion, that is the correct way in which the provisions found in Parts III and IV have to be understood.<sup>4</sup>

This view of the relationship between 'Fundamental Rights' and 'Directive Principles' has been confirmed in two other important cases, namely, the *Cow Slaughter* case (A.I.R. 1958 S.C. 731) and *Kerala Education Bill* case (A.I.R. 1958 S.C. 956). I give the salient passages below:

Article 13(2) expressly shows that the State was not making any law which takes away or abridges the rights conferred in Chapter III of our Constitution which enshrines the fundamental rights. The directive principles cannot override categorical restrictions imposed on the legislative power of the State.<sup>5</sup>

Again,

Therefore although this legislation may have been undertaken by the State of Kerala in discharge of the obligation imposed on it by the Directive principles, enshrined in Part III of the Constitution, it must nevertheless subserve and not override the fundamental rights conferred by the provisions of articles contained in Part III of the Constitution.<sup>6</sup>

Of course, Subba Rao C.J., in *Golaknath's* case does not underplay the importance of the directive principles. On the contrary he gave them also a very high position, using the following words:

In Part IV of the Constitution, the Directive Principles of State Policy are laid down. It enjoins it to bring about a social order in which justice, social, economic and political—shall inform all the institutions of national life. It directs it to work for an egalitarian society where there is no concentration of wealth, where there is plenty, where there is equal opportunity for all, to education, to work, to livelihood and where there is social justice.

He also gives the fundamental rights great importance:

They are rights of the people preserved by our Constitution. 'Fundamental Rights' are the modern name for what have been

4. A.I.R. 1951 S.C. 226 (228).

5. A.I.R. 1958 S.C. 731 (739).

6. A.I.R. 1958 S.C. 956 (966).

committed from early twenties of the century. In contrast it had to amend the Constitution if it was determined to achieve the national objective.

The first challenge to the amending power under the Constitution was in *Shankari Prasad's* case in 1951. Had the Bench that heard this case decided that the first amendment was void for the same reason as the majority in *Golaknath's* case held the seventeenth Amendment to be outside the scope of article 368, then only two possibilities were open for the country; either the Constitution as it stood would have to be torn and destroyed and a new constitution adopted, which would permit such agrarian reform as Parliament wanted; or India would have to abandon path of agrarian reform and justice to the tillers of soil to which it was committed for over quarter of a century prior to the achievement of Independence.

This is the essential political implication of the majority view of the limited scope on article 368 in *Golaknath's* case. No man can look into the future with any definiteness about any matter but much more so about matters of socio-economic development. Hence what the Constitution-makers thought was a reliable framework within which to build the egalitarian society outlined in Chapter IV may be found later to contain many obstructions to the establishment of that very egalitarian society. It is equally possible that a future generation may feel that the type of society envisaged in Part IV is not suited to the need of the age in which they live. In either case there will arise the need for amendment of Part III if Part III stands in the way of establishing the type of society that the people desire. The essence of the weakness of the majority decision in *Golaknath's* case is that it avoids this central lesson of constitutional history. To conclude with the words of Justice Frankfurter:

The Constitution owes its continuity to a continuous process of revivifying changes. The Constitution cannot make itself, some body makes it, not at once, but at several times. It is alterable; and by that drawth nearer perfection and without suiting itself to differing times and circumstances, it could not live. 'Its life is prolonged by changing reasonably the several Parts of it at several times'. So wrote the shrewd Lord Halifax, and it is as true of our written Constitution as of that strange medley of imponderables which is the British Constitution. A ready and delicate sense of the need for alteration is perhaps the most precious talent required of the Supreme Court. Upon it depends the vitality of the Constitution as a vehicle for life.

amended article 31(2) and took the adequacy of compensation outside the scope of judicial review. The fourth amendment also introduced clause 2-A in Article 31 in order to get over three decisions of the Supreme Court *State of West Bengal v. Subodh Gopal Bose*,<sup>9</sup> *Dwaraka Das Shrinivas v. Sholapur Spinning and Weaving Co. Ltd.*<sup>10</sup> and *Saghir Ahmed v. State of Uttar Pradesh*.<sup>11</sup> By this new clause Parliament makes it clear that any law affecting the right of property which does not transfer ownership or the right to possession cannot be brought within the scope of articles 31 and 31 (2).

And last came the seventeenth amendment which changed the definition of the term "estate" in article 31-A in view of the restricted meaning given to the term in the two decisions of the Supreme Court, *Karimbil Kunhikoni v. State of Kerala*<sup>12</sup> and *A. P. Krishnaswami Naidu v. State of Madras*.<sup>13</sup>

Thus, each one of these different amendments can be seen to have been brought about because the Court's interpretation of the scope of articles 31 and 31-A stood in the way of enactment of laws necessary for India's economic development, as envisaged by Parliament. Subba Rao C.J. may have thought that Parliament's view on the socio-economic reform that was necessary for India's further economic progress was erroneous; but that surely was not a matter that came within the scope of judicial review or discussion but was essentially political.

Perhaps the most clear-cut answer to the approach of Subba Rao C.J. is that without such constitutional amendment the agrarian reform envisaged over decades through the abolition of the Zamindari system would have proved impossible. What was at stake in the challenge to the validity of the Zamindari Abolition Acts was whether full or market-value compensation should be paid to the Zamindars and Inamdars when their rights in relation to land were abolished. Before the full Court, an argument fully backed by facts and figures was advanced that any attempt to pay full or market-value compensation for such rights would have led to a complete breakdown of Indian economy. The amount involved was far more than the Indian people could have afforded. Hence if Parliament was to accept the decision of Patna High Court (reported in A.I.R. 1951 Patna 91) invalidating the Zamindari Abolition Act then it would have accepted abandonment of the agrarian reform and the abolition of the Zamindari system to which the national movement was

9. 1953 S.C.R. 587.

10. 1954 S.C.R. 674.

11. 1955 (1) S.C.R. 707.

12. 1969 (1) S.C.J. 510

13. 1965 (1) S.C.J. 239.

doctrines—the doctrine of '*Stare Decisis*' and the doctrine of 'Reasonable Doubt' and introduces the doctrine of 'prospective over-ruling' is again in keeping with the belief of this school that decisions turn on 'imponderables'.

I would, therefore, commend to this convention the 'Realist school' and hope that someone with the necessary ability would examine the judgment and the findings in this case from the 'realist' point of view. It is proposed in this paper to attempt such an approach.

### **Constitution and its 'torture'**

The 'realist' school believes that Constitutions can be tortured just as men can be ! But as constitutions do not have corporeal bodies, it is their texts that are tortured. There is no reason to believe that this 'torture' is confined to lawyers and judges. Administrators, legislators, in fact all of us engage in it occasionally i.e., when it suits us to do so ! That is why the legal terminology constantly speaks of 'tortured construction'. That is why, as if disgusted by the whole business, shrewd judges and jurists have evolved 'Canons of Interpretation' or 'Construction Canons', as we all know, are useful tools like their similarly high sounding counter-parts in warfare. Properly employed they vanquish the enemies called 'Doubt and Ambiguity', but when not so employed they only make confusion worse confounded. We may examine, therefore, how these canons have been employed in interpreting article 13(2) of our Constitution, but before doing so we may see what great judges have told us about canons and interpretation.

### **Justices Holmes and Cardozo on Interpretation**

The celebrated Justice Holmes gave us some wholesome precepts on interpretation. He has said, "The meaning of a sentence is to be felt not proved." "The general purpose is an important aid to meaning than any rule, grammar or formal logic, may lay down." Cardozo, another American judge, whose name is familiar in the legal world, had this to say of interpretation: "Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change in policy, to formulate a plan of government. The aim is evinced in the language of the statute. We should look at the statute and nothing else. The history of changes, discussion are all irrelevant. Legislative history must not swallow the legislation. Courts may not be confined by the language but they are confined by the statute. In construction it is a choice between uncertainties. We must choose the lesser." Fortified by this advice we may now tackle the interpretation of article 13(2) of the Constitution. We may look at the Constitution and nothing else. We may feel the meaning of its clauses assisted by logic. We may throw overboard, what the majority judges in *Golak Nath's* case, have



amended like any other law, by that very logic, he is admitting or recognising that the Constitution is a law apart, that it is a special law, that it is a law different in kind from all other legislation or law. In fact, the majority judgment seems to affirm this, though in a different context. The judgment observes "there is an essential *distinction* between the Constitution and the Statutes. Comparatively speaking, Constitution is permanent; it is an organic statute; it grows by its own inherent force". If that is so, and the judges assert it in that manner, what is the difficulty in their recognising the Constitution as a distinct category of law and excluding it from the definition of 'law' in article 13(2)? It should be clearly understood that Judicial Review itself rests on the basic idea of one law being superior to another: Would we not be justified in saying that the judges in this case strained the language and should have clarified the position much better? We may examine what the Constitution itself has to say about this '*distinction*'.

### Judges and their oath

On assuming office, judges of the Supreme Court take an oath or make an affirmation in a form prescribed in the Third Schedule to the Constitution which ends with the words—"I shall uphold the Constitution and the laws". The President, the Vice-President, the Ministers, and all Constitutional authorities take a similar oath. We notice that this distinction has been maintained in other articles also, for example articles 266 and 326. What does this distinction mean and why has it been made? What did the judges in any case understand when they took their oath "to uphold the Constitution and Laws"? How is it, as some of the judges have now interpreted in *Golak Nath's* case, the Framers of the Constitution did not treat "the Constitution and the Laws" as identical. These are the 'imponderables' of law. And those are some of the questions which this Convention may well consider.

### 'Content' and 'Process' in Legislation

The next question we may attempt to answer is how one law is 'distinct' from another and how can we distinguish Constitutional Law as a category from other laws. When anybody calls the Transfer of Property Act, and the Constitution of India 'laws' without knowing their content what does he understand or mean? He calls them 'laws' firstly because there is no other common or abstract name by which to call them and secondly because he is aware they are acts of legislature, that they have all gone through a legislative process, been approved by Parliament and the President, and that, therefore, they are binding as law. It is only when he wants to know all about mortgages, or desires to know the source from which judges of the Supreme Court derive their power of judicial

called, the catena of American or other English decisions together with extracts from books on Constitutional Law torn out of their context and the political systems in which they apply. The reason being, we are looking at our Constitution and not theirs.

### **Counsel take position about Article 13(2)**

The majority of the judges in *Golak Nath's* case have held that an amendment of the Constitution is 'law' within the meaning of article 13(2). It is not difficult to see how this finding was arrived at, if we make a 'Realist' approach to the question. We see from the judgment that there were able counsel on either side and the moment they realised what the main issue was they set about their respective tasks with alacrity. Counsel on behalf of the petitioners being practical men saw only that which they wanted to see. They saw if they were to succeed, they had to hold that an amendment of the Constitution was 'law'. They did so; and thereafter it was easy for them to marshal every conceivable, plausible or possible argument in favour of it, drawing freely from law, logic, precedents, and bulky books on Constitutional Law. Counsel on behalf of the Respondents did likewise to support the contrary view. The majority of judges felt the views of the former represented their own view. They accepted it. And, as with legislatures so with judges, it is the majority that counts.

### **The correct question about Article 13 (2)**

If a 'realist' approach is made the correct question to ask about article 13(2) however, is not whether an amendment of the Constitution is 'law' or not. It is like asking the question whether a dragon is a bird or an animal. If we think of its wings we could call it a bird. If we think of its claws and paws we can call it an animal and nobody can stop us from doing so. If we think of its existence we may begin to doubt it and end up by calling it a figment of imagination. It is, therefore, no use asking if an amendment of the Constitution is 'law'. The proper question to ask is, whether Constitutional Law as a category is different or distinguishable from all other law as another category, whether it has been traditionally so recognised, and whether the Constitution of India itself by words expressed or implied makes any such distinction. In answering these questions we may draw on logic, tradition, experience and the text of the Constitution itself.

### **Logic discovers amendability**

We may examine first the logic of the finding that the fundamental rights cannot be amended so as to take away or abridge them. 'Ordinary law', as we all know, can be amended freely and as frequently as desired. When anyone asserts that the Constitution, or any part of it, cannot be

amended like any other law, by that very logic, he is admitting or recognising that the Constitution is a law apart, that it is a special law, that it is a law different in kind from all other legislation or law. In fact, the majority judgment seems to affirm this, though in a different context. The judgment observes "there is an essential *distinction* between the Constitution and the Statutes. Comparatively speaking, Constitution is permanent; it is an organic statute; it grows by its own inherent force". If that is so, and the judges assert it in that manner, what is the difficulty in their recognising the Constitution as a distinct category of law and excluding it from the definition of 'law' in article 13(2)? It should be clearly understood that Judicial Review itself rests on the basic idea of one law being superior to another: Would we not be justified in saying that the judges in this case strained the language and should have clarified the position much better? We may examine what the Constitution itself has to say about this '*distinction*'.

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review over amendments to the Constitution that he begins to think and look into their texts or content and then distinguish these 'laws' from one another. In other words laws are distinguished from one another not so much by their process as by their content. Constitutional Law as a category is distinguished from all other laws as a category not only by its process, and content, but by its nature, authority and sanctions. A constitution is that law from which legislatures derive their power to make laws; the government its power to execute those laws; and judges their power to interpret and apply those laws. There is only one basic constitution for a country and one instrument that does this. Its other 'laws' can fill volumes by the dozen. That is why we call the Constitution the organic or fundamental or 'Higher' law of the land and distinguish it from positive law, i.e., acts of legislatures which get into our statute book. That is what experience at any rate tells us.

### Purpose of Article 13

The meaning of article 13 becomes clear if we read it as a whole with article 12 which precedes it. Reading the articles piecemeal or trying to find the meaning of words like 'State' and 'Law' can lead us to absurdities. For example, we could say the word 'State' includes the Judiciary which is an organ of the State and the word 'law' includes judge-made law, i.e., doctrines and decisions. Based on these premises it can be argued that the Supreme Court cannot tamper with fundamental rights. But to say so would be absurd, because neither the judges nor the lawyers will accept it. It is what is acceptable to lawyers and judges that is good law; for are they not the guardians of our Constitution? To revert to the main argument we then ask ourselves the question what the purpose of these articles is, what mischief they seek to obviate or what omission they supply. We notice that if article 13 had been omitted there would have been no power to review any administrative order, or any custom or usage [article 13 (3) (a)] that has the effect of taking away or abridging the rights conferred by that part. The courts would have been confined to providing only the remedies mentioned in article 32 on a case to case basis and to a limited extent. Article 13 then provides in a way for a wider power of Judicial Review of any legislation etc., affecting the fundamental rights as given in the Constitution. The Framers of our Constitution could not have been unaware that in the absence of such a power in the American Constitution the subject of Judicial Review of legislation has since Chief Justice Marshall's decision in *Marbury v. Madison*, been a constant source of controversy which some jurists even today treat as "an usurpation of power" of the Congress by the Supreme Court of U. S. A. In *Golak Nath's* case our Supreme Court goes much further and not only claims the right to

Judicial Review of legislation but the right to Judicial Review of a Constitutional amendment. We may state at once that on the present interpretation there is no such power given, nor can any such power be deduced from article 13. Even the power to review is doubtful because on a strict construction it has not been stated who will declare such law void. Then all article 13(2) can claim is to give the Supreme Court the power to judicially review any post-Constitutional 'Legislation' just as article 13(1) gives it the power to review pre-Constitutional 'Legislation' inconsistent with the fundamental rights.

### **Doctrine of Reasonable Doubt**

The doctrine of reasonable doubt as judges and lawyers are aware, is a firmly established doctrine of constitutional law. It is a doctrine which judges have created and applied in all branches of law including criminal law. In constitutional law the doctrine holds that an act of the legislature must be presumed by the courts to be constitutional until its unconstitutionality is demonstrated beyond reasonable doubt. The doctrine further states that all reasonable doubts regarding the constitutionality of a law will be resolved in favour of the law. The fact that Government, Parliament and the judges of the Supreme Court had hitherto acted on the basis that article 13(2) does not apply to an amendment of the Constitution should have been respected by the judges in the present case, when they felt themselves called upon to examine the correctness of this interpretation. Members of Government and Parliament also take the oath to uphold the Constitution. Judges ought then to assume that under the oath members of Parliament consider with equal care the constitutionality of every law they pass. Judges in the present case have nowhere indicated in the judgment why this salutary doctrine of judicial constructions was not followed. When judges invalidate a statute which the Government and Parliament have approved, and whose principles they have affirmed time and again "public interest" required that judges should have availed of this doctrine rather invalidate legislation by a narrow majority of 6 to 5. It is precisely in situations like this, when six judges affirm one way and five others equally affirm the other way that there is reasonable doubt and it becomes the duty of one of the six to involve the 'Doctrine of Reasonable Doubt'. If this had been done, it would have also avoided the unsettling effect of discarding the doctrines of *Stare Decisis* and introducing 'prospective over-ruling'.

### **"Fundamental" Rights and Wrong**

The Constitution, as the judges have rightly indicated, did not create fundamental rights. They existed before the Constitution and the Constitution only gave them a form and recognition. They are not

exhaustive either. There is no doubt these rights have to be cherished by the Courts as well as by all the citizens. It is nobody's case that they should not be. But at the same time these rights have never been absolute, nor did the Framers of our Constitution intended them to be so. Some of them are not rights at all. They are mere privileges and immunities. Most of them represent personal and private rights and as such they carry with them, therefore, their own limitations. These limitations have been imposed not because governments are "power drunk" but because such rights have to be subordinate to 'public interest'. We should also remember that the attack on rights in modern times comes not so much from governments as from individuals and groups. The Republic was established to ensure political, economic and social justice for all and not for individuals or a group only. Social and economic justice then cannot be translated merely into terms of personal and private rights. Private rights when they infringe the rights of others become public wrongs. Part IV of the Constitution which enumerates what the public rights or interest are, was embodied in the Constitution and excluded from the jurisdiction of the Courts, not only to remove them from the field of political or judicial controversy, but to cast a duty on the State to translate them into laws. By that token it is the duty of the judges as of the Government and Parliament, as guardian of the Constitution, to uphold them even in derogation of personal or private rights. The Framers of our Constitution sought to establish a legal order not individual rights.

### **Governments and Rights**

The duty of a government is to govern, i.e., to maintain peace and order and work for the benefit of all. In this process governments and legislatures have to place limitations and restraints on individuals' rights. The nature of these limitations, and the public interest they are to subserve have been indicated in Parts III and IV of the Constitution by the Makers of our Constitution. The interests of public order, safety, health, decency, morality, security of the State, and the sovereignty and integrity of India come above these individual rights and have to be regulated. The concepts of what is public interest are not static. Individual rights change with human ingenuity with discoveries and with human progress. Rights thus need to be constantly revised. Regulation and restraint do not impair them as such. There is continuous attempt by the State to balance private and public interest and in the process the sphere of what the State will protect at any time enlarges from the point of view of some and contracts from the point of others. As long as there is redress for every wrong there is nothing anybody need complain about and that is what courts are meant for.

**Questions for the consideration of the Convention**

It now remains to indicate what questions this Convention could appropriately consider. It is suggested the following two are basic:

- (1) Whether the Constitution gives the Supreme Court the express power to judicially review Acts of Parliament when in their constituent capacity they amend the Constitution or any part of it.
- (2) Whether what is constitutionally permissible (or not) is a legal question or a political question.

For taking practical steps in view of the judgment following two questions arise:

- (1) Whether the word 'law' in article 13(2) should not be defined in article 366 so as to exclude an amendment of the Constitution from its purview.
- (2) Whether the simple majority of judges for delivering a judgment mentioned in article 145(5) should not be raised to a two-thirds majority, if not a three-fourth majority, when the constitutionality of an Act or of an amendment of the Constitution is in question.

## *Fundamental Rights and Constitutional Amendments*

•R. V. S. MANI†

AT THE OUTSET, may I express my grateful thanks to the Institute of Constitutional and Parliamentary Studies for inviting me to participate in this Convention to consider the effect of the value judgment of the Supreme Court in *Golak Nath's* case.

I was responsible for the initiation of *Golak Nath's* petition in the Supreme Court and for the argument that article 368 of the Constitution does not contain any power to amend the Constitution and that it only prescribes the procedure for its amendment. Article 368, it may be noticed, lays down that a Bill for amendment has to be passed by the Parliament and in the case of enumerated articles therein, it has to be further ratified by the State Legislatures and then assented to by the President. In other words, the Parliament, the State Legislature and the President have their respective role to play in the process of amendment. It may further be noticed that article 368 does not lay down any time limit for the President's assent, nor does it say that if the President does not wish to give his assent, he shall return the Bill to the Parliament for reconsideration. The result is that the President may neither assent to the Bill nor return it to the Parliament without his assent, thereby completely vetoing the amendment. In other words, the President has vested in himself an absolute power of veto in respect of any Bill for the amendment of the Constitution. It would be a misconception, therefore, to hold that article 368 vests in the Parliament a power to amend the Constitution.

Where then is the power to amend the Constitution? This important question must lead us to a close examination of each and every article of the Constitution. The answer that I gave to the Supreme Court, in my humble opinion, appeared to me to be the only and the best answer. But it did not find favour with the judges. The majority

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judgment held that the power to amend the Constitution is the same as the power under articles 245, 246, 248 and item 97 of the First Legislative list in the Seventh Schedule. This led the judges further to suggest that an amendment to the fundamental rights can be effected only by an enactment for an opinion poll, a referendum or a Constituent Assembly. Such a suggestion naturally evoked the criticism that it was not a practical solution and that a Constituent Assembly would hardly be better than a constituted body like the Parliament. While I am not averse to accept the solution handed down by the Court, I still feel that if the judges had accepted the answer that I formulated, the difficulties envisaged in convening a Constituent Assembly or in holding a referendum or an opinion poll might not arise and still the procedure laid down in article 368 could be utilized for such an amendment. It must be remembered that what article 13(2) of the Constitution prohibits is only abridgement or abrogation of the fundamental rights and not its social control in accordance with the directive principles in Part IV of the Constitution.

The answer that I gave to the Supreme Court and that I would reiterate today is this: It is the amendability of the article sought to be amended that gives the power to amend that article. I can take article after article and demonstrate how each one of them has built-in elements to show whether it is amenable to amendment or not. Take for instance article 52 of the Constitution. It says: "There shall be a President of India". May I ask if you can conceive of the power to amend that article by the simple substitution of the word 'no' in the place of 'A' so that the article will read "There shall be no President of India." I am sure none in this Convention will assert that there is such a power to amend article 52. Why so? Because we look at the conspectus of the Constitution. Our Constitution has built the nation into a Sovereign Democratic Republic and the President is at the apex of our national structure and is its symbol. How can we do away with the symbol without doing away with our entire national structure? In other words, we agree that article 52 is unamendable under any circumstances and none of the bodies concerned in the amendatory process under article 368 has any power to amend article 52. It may be different if there is a revolution and some other polity is conceived of and article 52 is done away with. But as long as we are a Sovereign Democratic Republic, we cannot amend article 52 to say that there shall be no President of India or that there shall be two Presidents of India.

Let us again take article 56 of the Constitution. It says the President shall hold office for a term of 5 years. It can certainly be amended to say that the President's office shall be for 4 years or 15 years

without any violence to the conspectus of the Constitution. This article, therefore, is amendable and so there is the power to amend it.

Some of the articles of the Constitution are so complicated that a host of judicial case-law has accumulated in construing them. And it may not be easy to determine the amendability, until we study the entire case-law.

Thus, before amending any article of the Constitution, I would suggest that we must ask ourselves the following questions:

- (i) Whether the particular article sought to be amended is amendable?
- (ii) Whether there is a constitutional necessity for the proposed amendment?
- (iii) Whether the proposed amendment is proper in the conspectus of the Constitution?

The answer to the first question will determine the power to amend the particular article and the answer to the second and third questions will ensure the proper exercise of and obviate the misuse or abuse of the power of amendment.

It may be remembered that similar considerations arose when a reference was made to the Supreme Court in its advisory jurisdiction under article 143 of the Constitution to determine whether article 3 of the Constitution should be amended in order to enable the Government of India to cede the Berubari enclaves to Pakistan and the Supreme Court answered that there was a constitutional necessity to amend article 3 and that it should be done by the amendatory process under article 368 (1960 3 S.C.R. 250).

Thus, the formula as put forth by me, I venture to say, will not only determine the power to amend any particular article sought to be amended, but also employ the procedure for amendment in article 368, without calling in aid any machinery from outside the Constitution, as adumbrated by the decision in *Golak Nath's* case.

If and when an occasion arises for the amendment of any particular fundamental right in order to amplify its social control to meet the dynamic needs of the nation, then it would be the proper occasion to make a reference to the Supreme Court under article 143 of the Constitution, in order to determine if the proposed amendment is a constitutional necessity and if so whether the machinery for such an amendment would be the one prescribed under article 368. Till such a concrete occasion arises, a general reference as suggested by Shri N. C. Chatterjee, I am afraid, would be futile.

Any amendment of article 368 itself, may also be ill-conceived, inasmuch as any such amendment would be vulnerable to challenge as invalid on the tests that I have indicated herein above. Furthermore, any power of such amendment assumed by amending article 368 would be futile as against any particular provision of the Constitution which refuses any amendability by its very terms.

I would, therefore, make a very earnest appeal to the Members of Parliament to pause until a proper occasion arises to test the amendability of any particular provision of the fundamental rights for the purpose of carrying out any special object of social control, by a reference to the Supreme Court, in its consultative jurisdiction under article 143 of the Constitution.

## *The Golak Nath Case and After*

• V.G. RAMACHANDRAN†

IN THE CONSTITUTIONAL history of nations certain peak points are reached not as a result of a sudden upheaval but as the consequence of a series of pre-events leading to a crisis.

We may instance *Golaknath's* case, as the culmination of a series of events in the legislative and judicial spheres of our national government. Perhaps the Legislature and the Judiciary have both to take the blame for the casualty of the rights of the common citizen, who in a sort of way was quite in a maze not to know exactly where he was and what rights he had despite the grandiose chapter on fundamental rights in Part III of the Constitution.

Fundamental rights are hailed as very fundamental and sacrosanct transcendental rights that can never be erased. Was it not the late Pandit Jawaharlal Nehru who said on April 3, 1947, in proposing for adoption of the interim report on Fundamental Rights in the Constituent Assembly:

A fundamental right should be looked upon not from the point of view of any particular difficulty of the moment but as something that you want to make permanent in the Constitution.

Earlier in May, 1928 at the Madras Congress, Pandit Motilal Nehru observed in his report to the Congress:

It is obvious that our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances. Another reason why great importance attached to a 'Declaration of Rights' is the unfortunate existence of communal differences in the country. Certain safeguards are necessary to create and establish a sense of security among those who look upon each other with distrust and suspicion. We

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could not, better secure the full enjoyment of religious and communal rights to all communities than by including them amongst the basic principles of the Constitution.

Thus we get to know why the founding fathers incorporated the rights as the foremost Chapter in the Constitution, even before enumerating the powers of the Legislature, the Judiciary and the Executive. These rights were made justiciable by resort to writs under articles 226 and 32. The writ remedy under article 32 itself is declared a fundamental right which no Parliament can take away or abridge. Dr. Granville Austin, a non-Indian, in his informative book entitled "*Indian Constitution—Cornerstone of a Nation*" recognises the transcendental nature of these rights and withal the scope of a slow social revolution, through resort to law as conditioned by the restrictive clauses 2 to 6 in article 19 and the implementation of the Directive Principles of State Policy which may be upheld as reasonable restrictions of the rights in Part III of the Constitution. The learned author says:

The case of the commitment to the social revolution lies in Part III and Part IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution... India was a land of communities of minorities, racial, religious, linguistic, social and caste. For India to become a State, those minorities had to agree to be governed both at the centre and in the province, by fellow Indian members, perhaps of another minority—and not by a mediatory third power—the British. On the psychological and political grounds, therefore, the demand for written rights—since rights would provide tangible safeguards against oppression—proved overwhelming.

Herein you have in a nutshell the background necessity for retaining for ever Part III of the Constitution. If it is to be whittled down or erased, the background vanishes and you have chaos—a revolution by minority against minority or minority against majority, as the case may be, in the ever changing balance of party power politics in India. During British regime, from the days of Queen Victoria's proclamation, we have had assurances as to the rights of minorities and rights pertaining to religions and honouring of customs. With the British away since 1950, we introduced Part III as a charter of assurance to the various diverse minorities. This is the sheet-anchor of our political stability. Denude it or disturb it, you seek peril and destruction of a tranquil and peaceful society, willing to adjust to the just claims of all minorities.

#### **What led to Golaknath doctrine]**

We would now shortly catalogue the events that led to the present impasse. Supreme Court Judges in the period 1950-1960 were wrong

in attuning their attitude to the conditions in the country. They should have merely interpreted juristically the constitutional provisions. They tried to equate themselves to the Judges of Supreme Court of America, who are in conditions of a society far different to ours.

(a) **The situation caused by earlier Judgments**

The first was the unfortunate decision of the Supreme Court in *Shankari Prasad v. Union of India*.<sup>1</sup> It was doubly unfortunate since it was an unanimous decision of the Court which was composed of five judges three of whom became Chief Justices of India. While upholding the constitutionality of articles 31-A and 31-B of the Constitution, the Court upheld the Constitution (First Amendment) Act of 1951, as *intra vires*. They laid down that though articles 31-A and 31-B ran counter to the rights in Part III, yet they were constitutional to be void. This decision has indeed cost the nation very much. The people were misled and the Legislators, legitimately thought that they will be acting right in introducing amendments of the Constitution as that will not be violation of article 13 at all. The result was we had nearly twenty constitutional amendments, a good many of which contravened the rights in Part III.

For one thing, the First Constitution (Amendment) Act also introduced an amendment of article 19(2) by including the phrase 'in the interests of the public order.' The Congress Party in power was faced with law and order problem created by the Communist Party. The Government was only one year old and hardly had the time to settle down. It also wanted to introduce social welfare legislation and agrarian reforms, which were considered then laudable. Ergo, the Supreme Court leaned towards upholding executive action. It is, however, a great pity that the Supreme Court allowed itself to be under- and thus.

The result was amendments galore to the Constitution, affecting even property rights. The Constitution (Fourth Amendment) Act, was one bad consequence.

While the Legislature trampled on the people's rights, it is not as if the judiciary was free from such blame. By a catena of intriguing decisions article 14 (Equality Clause) was rendered ineffective. By reversing the good judgment of the High Court in *Rangachari's case*,<sup>2</sup> the Supreme Court construed the word 'post' in article 16(4) as to mean not only initial appointments put also selection posts which are earned as promotions. This rendered a national loss. Even the Legislatures did not intend this.

1. AIR. 1951 SC 458. 1952, S.C.R. 89 (Kania, C.J., Patanjali Sastri, B.K. Mukherjee, S.R. Das and Chandrasekhara Iyer, JJ.).

2. *General Manager v. Rangachari*, A.I.R. 1922 S.C. 36.

This practically upset the national balance of merit and affected its productivity and efficiency drive. Enough justice was assured to the backward classes by special provision as to their initial recruitment.

*A.K. Gopalan v. State of Madras*<sup>3</sup> was yet another instance of judicial affectation for *status quo* and stabilising conditions in the country to enable Government function easily. The word 'law' in article 21 was construed as statute law by the majority opinion, though Fazli Ali J.'s interpretation was quite reasonable as according to him 'law' would include the four principles of natural justice, notice, opportunity to be heard, an impartial tribunal and orderly course of procedure. What matters if A.K. Gopalan, a Communist M.P., derives additional protection akin to 'due process' law of America? But, *A.K. Gopalan's* case virtually shut out the finer aspects of liberty to the individual guaranteed in article 21. Was not the Supreme Court inclined in the *Delhi Laws Act* case<sup>4</sup> to discover the traces of American due process in India, namely, that there was some constitutional trust, some sacred principle, lying at the basis of representative democracy which prohibits the legislature from delegating to another its essential function. Even a foreign commentator, as Prof. Bernard Schwartz, criticised the decision in *Gopalan's* case as it eliminated from the Indian law both the British concept of natural justice and the American equivalent 'due process of law'. The result is that the Court is rendered powerless to interfere with a law depriving citizens of personal liberty, except on the ground of legislative competence.

Again, have not the Supreme Court rendered article 32 less fundamental by imposing the rule of *res judicata* on it<sup>5</sup> on the plea that that doctrine was based on the highest ground of public policy. Can anything be more high in policy than fundamental right? Legislators and citizen criticise the Judges in this regard. Did the Judges take the *res judicata* simply to avoid more writ petitions? They could have entertained the writs and disposed them off *in limini* if they were pointless!

#### (b) The situation caused by the Legislature

Power always corrupts. Sustained power over a long period does increase the corruption of power. So was it in India when the Congress Party was fully in power for nearly eighteen years. It is only after the 1967 elections that we have other parties in power in some of the States and there is an opposition party growing in the Central legislature. We may cite the Law Commission Report, Vol. II, p. 673, wherein Dr. Sir C.P. Ramaswamy Iyer's famous opinion is cited: "Whereas in India

3. A.I.R. 1950—S.C. 27 (1950) S.C.R. 88.

4. *In re: The Delhi Laws Act*, (1951) A.I.R. 1951 S.C. 332; (1951) S.C.R. 747.

5. *Daryao & others v. State of U.P.*, A.I.R. 1961 S.C. 1457.

today the Legislature is really dominated by a single party and where the Press is not functioning fully as the fourth estate of the realm, *the executive must be kept in bounds until opposition has grown by a conscience of its own.* Authority has tended to give the executive a taste for blanket powers which it is almost impossible to contend in a Court of Law. The last of our defences, the Judiciary, is being rendered less effective *by reason of the drafting of our laws and ordinances which makes it almost impossible for the action of the executive to be questioned.*"

Equally scathing was the opinion of Justice Kania, the first Chief Justice (*Vide Law Commission Report, Vol. II, p. 673*) who said at the inauguration of the Assam High Court thus. "In view of the fact, however, that the opposition is negligible the position of the Judiciary becomes all the more important. Having regard to this position of the Legislature, if the executive Government, which is now responsible to the Legislature, *does acts which encroach upon the liberty of the subject, the only forum which can give redress against irregular action of the executive is the court.*"

Again it was in *Romesh Thapper v. State of Madras*<sup>6</sup> that Patanjali Sastri, C. J. said: "The Court is thus constituted the protector and guarantor of fundamental rights and it cannot consistently with the responsibilities so laid upon it, refuse to entertain applications seeking protection against the infringement of such rights." The Justice likened the judiciary to be the "*sentinel on the qui vive*" ever ready to safeguard the citizen as to his fundamental rights.

And so, if in the interpretative jurisdiction, the courts upheld the rights of the citizen, it is an abuse of power if the Legislature circumvented it by amending or introducing a new law or a constitutional amendment. The fetter was more for the latter since article 13 could be bypassed in view of the *Shankari Prasad* case. How else can you explain the Constitution first amendment after the *Romesh Thapper* case and then again the Constitution fourth amendment after the decision in the *State of Bihar v. Kameshwar*?<sup>7</sup> Thereby the Legislature reenacted the entire clause (2) of article 31 making compensation non-justiciable and inserted a new clause (2-A) and made further changes in article 31-A.

Mr. Justice William O'Douglas of the U.S.A., in his Tagore law Lectures,<sup>8</sup> significantly states that "the Fourth Amendment casts a shadow over private factories, plants, or other individual enterprises in India. The Legislature may now appropriate it at any price it desires substantial

6. 1950 S.C.R. 594 at 59.

7. 1952 S.C.R. 899 : A. I. R. 1952, S.C. 252.

8. See p. 244.



or nominal. There is no review of the reasonableness of the amount of compensation. The result can be just compensation or confiscation dependant wholly on the mood of Parliament".

The mood was never bright or fair so far as compensation to the citizen, deprived of his property was concerned. From 'just' it came to 'nominal compensation'. Why should Parliament have rushed to pass the fourth amendment? Is it to accommodate the acquiring tendency of the Government of private lands. Zamindari and Inams went. But why should the word 'Estate' include 'Ryotwari' also? In various sweeps of constitutional amendments culminating in the seventeenth amendment, what was *ultra vires* of Part III was legalised by a fiction! Part III was not to apply to a long schedule of expropriatory Acts in the Ninth Schedule! This has grown into a long list of 64 Acts so far and may well go to legion if this madness of enacting lawless laws by a constitutional fraud—namely amending of the Constitution 9th Schedule is tolerated or allowed. Then why have Part III at all, if we want to have 103 statutes exempted from its operation! What is this except flouting the courts' decisions, flouting the Constitution and flouting the people's rights. If these conditions are to continue you may soon have Part III reduced to ashes. What is the remedy? The judges had given power to the Parliament which the Constitution as originally framed did not give. *Shankari Prasad's* case made constitutional amendment as not a 'law'. This power the Parliament has been using as 'Bhasmasura' did on Lord Shiva himself. The court faced a dilemma much in the way as Shiva did. Ergo Vishnu the Protector had to step in. The Chief Justice in *Golaknath's* case performed this function of 'Vishnu'. *Golaknath's* case put a stop to all this. What of the countless acquisitions wrongfully done by the executive and what of numerous nominal compensations said to have been lawfully given. There was no justice or morality about it all except arbitrariness!

### The ratio of Golak Nath's decision

We had visualised and written<sup>9</sup> in 1952 that *Shankari Prasad's* case was wrongly decided. There were other jurists who opined so. But we were in a minority, and the Judges of the Supreme Court had the privilege of deciding rightly as well as wrongly. What they decided was the law of the land under article 141. Fortunately, the Supreme Court has the power under article 137 to review its own judgments, and orders. It was wise of the Constitution makers to provide so. Else, we will permanently suffer under the weight of *stare decisis* of even wrong judgments of Highest Court of the land.

9. See V. G. Ramachandran, *Fundamental Rights and Constitutional Remedies*, 1967.

So far as the Legislature is concerned, it can only be corrected by a court of law. But when courts do correct them, if Legislatures bypass it and repeat the same by a new law, *it is clearly a colourable exercise of their legislative power*. What did *Golaknath's* case decide? Subba Rao, C.J., delivering the majority opinion,<sup>10</sup> gave the following findings:

(1) The power of Parliament to amend the Constitution is derived from articles 245, 246 and 247 of the Constitution and not from article 368 thereof *which only deals with procedure*. Amendment is a legislative process.

(2) *Amendment* is law within the meaning of article 13 of the Constitution and therefore, if it takes away or abridges the rights conferred by Part III thereof, *it is void*.

(3) The Constitution First (Amendment) Act, 1951, Constitution (Fourth Amendment) Act, 1955 and the Constitution (Seventeenth Amendment) Act, 1964 *abridge the scope of the fundamental rights*. But on the basis of the earlier decisions of this Court, they were valid.

(4) On the application of the doctrine of '*Prospective over-ruling*' as explained by us earlier, *any decision will have only prospective operation and therefore the said amendments will continue to be valid*.

(5) We declared that *the Parliament will have no power from the date of this decision to amend any of the provisions of Part III of the Constitution, so as to take away or abridge the fundamental rights enshrined therein*.

(6) As the Constitution (Seventeenth Amendment) Act holds the field, the validity of the two impugned Acts, namely the Punjab Security of Land Tenure Act (X of 1953) and the Mysore Land Reforms Act (X of 1962), as amended by Act XIV of 1965, cannot be questioned on the ground that they offend articles 13, 14 or 31 of the Constitution.

It is appropriate to record here the conclusions of Hidayatullah J., also in *Golaknath* case. They are:

(1) That the fundamental rights are *outside the amendatory process* if the amendment seeks to *abridge or take away any of the rights*.

(2) That *Shankari Prasad's* and *Sajjan Singh's* case which followed it conceded the power of amendment over Part III of the Constitution on an *erroneous view* of articles 13 (2) and 368.

(3) That the first, fourth and seventeenth amendment being *part of the Constitution by acquiescence for a long time*, cannot now be

10. *Golaknath's Case*, A.I.R. 1967 S.C. 1643.

challenged and they contain authority for the seventeenth amendment

(4) That this court having now laid down that fundamental rights *cannot be abridged or taken away by the exercise of amendatory process in article 368, any further inroad into these rights as they exist today will be illegal and unconstitutional, unless it complies with Part III in general and article 13(2) in particular.*

(5) That for abridging or taking away fundamental rights, a constituent body will have to be convoked.

(6) That the two impugned Acts namely the Punjab Security of Land Tenures Act, 1953 (X of 1953) and the Mysore Land Reforms Act, 1953 (X of 1953), as amended by Act XIV of 1965, *are valid under the Constitution not because they are included in Schedule 9 of the Constitution but because they are protected by article 31-A and the President's Assent.*"

Thus the ratio decidendi of the *Golaknath* decision is :—

(1) that fundamental rights cannot *henceforth* be abridged or taken away by any constitutional amendment,

(2) the Parliament has no power to amend Part III in any manner as to abridge or take away the guaranteed rights.

This is all. There is no need to bother over 'prospective overruling doctrine' or the theory of 'acquiescence' if we accept the above two positions. There is no doubt that *Shankari Prasad's* case<sup>11</sup> was wrongly decided. In *Sajjan Singh's* case where Hidayatullah J. and Mudholkar J. had the first opportunity, they entered their emphatic protest and overruled *Shankari Prasad's* case. But Gajendragadkar C. J.<sup>12</sup> in a bare majority of three to two<sup>13</sup> was for upholding *Shankari Prasad's* case. It must be noted that Subba Rao, C. J. had no opportunity to give his view as he was not in the relevant Bench. It was in *Kochunni's* case<sup>14</sup> that for the first time Subba Rao J. posited the relevant position of article 19 (1) (f) *vis-a-vis* article 31, which in a way hinted that the legislative encroachment in the field of property and compensation was not called for. The opinion was that after fourth amendment, the two clauses of article 31 deal with different subjects and so a law depriving a citizen of his property would be void, unless the law complies with the provision of article 19 (5).

11. *Sajjan Singh v. State of Rajasthan*, 1965 (1) S. C. R. 933, A. I. R. 1965 S.C. 845.

12. Wanchoo J. & Raghubir Dayal J. concurring.

13. Hidayatullah and Mudholkar JJ. dissenting.

14. A. I. R. 1960 S. C. 1080.

The criticism that the Supreme Court overrules its own prior decision only indicates that the judiciary is alive to reason and conviction. It has power to review its prior judgments.<sup>15</sup> If legislatures also learn the art of correcting their errors and not feeling sore about it as a stigma on their power, it will be healthy indeed.

### The doctrines of 'Stare decisis' and 'Prospective Overruling'

It is erroneous to yet rely on the Blackstonian theory, which relied on the doctrine that judicial pronouncements created no new law but only revealed the old ones. The judge is said "to only find the law not make the law".

But even in England the rule of '*Stare decisis*' has been given a rude shock in the latest decision of House of Lords in *London Street Tramways v. London Council*; where Lord Gardiner, L. C., observed:<sup>16</sup>

Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of law. They propose therefore to modify their present practice and while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so. In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

This announcement is not intended to affect the use of precedent elsewhere than in this House.

What is the above except '*prospective overruling*' as *Subba Rao, C.J.* conceived. The Indian Chief Justice also restricted the use of this doctrine only to the Supreme Court.

Eminent jurists, like Cardozo, George F. Canfield, Robert Hill, Freeman and John Henry Wigmore, approve of the '*prospective overruling*' doctrine. Cardozo said<sup>17</sup>: "The Blackstonian rule that we are asked to apply is out of tune with the life about us. It has been made discordant by the forces that generate a living law."

In *Great Northern Railway v. Sunburst Oil & Ref. Co.*<sup>18</sup> the same Judge made the eloquent pronouncement:

15. *Bengal Immunity Co. v. State of Bihar*, A. I. R. 1955 S. C. 661.

16. (1966) 1 W. L.R. 124 L. R. (1898) A. C. 375.

17. In his address to the Bar Association of New York, when he was Chief Justice of New York State.

18. (1932) 237 U.S. 258, 366.

We think that the Federal Constitution has no voice upon the subject. A state in defining the elements of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may be so that the decision of the *Highest Courts* though later overruled was law nonetheless for intermediate transactions.

It will be seen that Cardozo, C. J., tried thereby to harmonise prospective overruling and *stare decisis*. True in America, this doctrine was applied to special cases more on the criminal side. That is because the Congress never erred in flouting judicial opinion or in indulging in unconstitutional legislation. In India this has happened. The judges at first tolerated this and now have to put an end to it. What is wrong in prospective overruling being applied to such cases is not easily discernible or acceptable. Strong situations invite strong action. Amendments galore to the Constitution in the sphere of Part III must need be put an end to.

Those who speak that that will render Part III static, do not know what the constitutional provisions permit. In the field of restrictive clauses, reasonable restrictions in public good or interest, there is a vista opened for dynamic social legislation, incorporating all or any of the Directive Principles of State Policy in Part IV. When you can do all this by statute why resort to amendment of the Constitution. The basic rights in Part III are sacrosanct subject to reasonable restrictions by law. Article 13 will declare all laws void if they contravene Part III rights and the restrictive clauses therein. Constitutional amendment is also a law which can be struck down by article 13.

It is petite to cite from a recent article by Dr. Wolfgang Friedmann in the *Modern Law Review* (Vol. 29, Nov. 1966) No. 6:

This prospective overruling, i.e., the overruling of well established precedent limited to future situations and excluding application to situations which have arisen before the decision and are therefore presumed to be governed by reliance on the overruled principle. As the Supreme Court of the United States pointed out in a recent decision in *Link letter v. Walker*<sup>19</sup> which held that 'The Constitution neither prohibits nor requires retrospective effect,' and that it was therefore for the Court to decide on a balance of all relevant considerations whether a decision overruling a previous principle should be applied retrospectively or not<sup>20</sup>, prospective ruling is clearly not compatible with the Blackstonian proposition that Courts do not 'pronounce a new law but maintain and expound the old one'. It

19. (1965) 381 U. S. 618.

20. *Great Northern Railway v. Sunburst Oil and Ref. Co.*, 287 U.S. 358.

implied a clear admission that courts do make new law and the very posing of the question whether the new rule should be applied retrospectively or only prospectively indicates the awareness of its legislative aspects ..... Despite isolated applications, the principle of prospective overruling gained a definite and respectable place in American Jurisprudence, through a decision of Mr. Cardozo in 1932.....The Supreme Court's decision delivered by Justice Cardozo, is like the Court's much more recent decision in *Link Letter* case,<sup>21</sup> an example of American Judges' much greater readiness as compared with their English brethren.

As stated earlier, even the House of Lords in England has of late veered round to the American view. India is a federal democracy as in the U.S. and the function of the Highest Court of the land should be more on the pattern of the Supreme Court of America. The Court's powers are unlimited and in the judicial process if the Highest Court expresses an opinion approving of the doctrine of overruling as necessary for the crisis in Indian democracy, the opinion must be taken with grace and understanding by legislators and jurists. It may not suit some of them or the executive. It may endanger their appetite for power. But, law is not meant to suit only such people. It has to be declared in general public interest of which the Courts are the accepted better guardians. A maker of law as Parliament cannot be the judge. The common man looks to Court for redress against executive action or unconstitutional legislative excesses. The common man venerates the High Courts so much that he would take in even bad law from them. But he would not tolerate an unjust legislation.<sup>22</sup> The five values of stability, protection of reliance, efficiency in the administration of justice, equality and the image of justice have necessarily to be weighed in this connection, and balanced against each other. Judged by these standards the citizens' fundamental rights need all such protection and the declaration of the law by both Subba Rao C. J., and Hidayatullah J. that there can be no further erosion of these rights by resort to the device of constitutional amendment appears very sound.

It is wrong to say that the doctrine had been invoked only in criminal cases in the United States<sup>23</sup>: "In civil matters 'prospective overruling' has hitherto been predominantly applied to cases involving the ending of Municipal and charitable immunities from court liability".<sup>24</sup> The

21. See *Supra*.

22. *Currer: Time and Change—Prospective Overruling in Judge Made-law*, 51 Va L. Rev. 201—234 (1965).

23. *Ide Modern Law Review*, Vol. 29, November 1966, No. 6.

24. See *Currer, op cit.*, p. 213.

reason is that in this type of case, public authorities and institutions are involved and that the ending of traditional immunities may provoke public and legislative process<sup>25</sup>. The development of declaratory judgment in the judicial process which 'prospective overruling' brings about is indeed a very healthy thing. Declaratory judgments prevent needless litigation and needless legislation. The legislator and the citizen are both held in check by this wholesome doctrine. Mr. Beryl Harold Levy<sup>26</sup> pithily states:

Ever since the publication in my book 'Cardozo and the Frontier of Legal Thinking'.....it has struck me increasingly that the drag in the development of new judicial methods such as prospective overruling, is associated with the lingering perdinance of traditional jurisprudence and the apathy towards realist jurisprudence.

The same learned writer adverts to a model statute relating to prospective overruling<sup>27</sup> thus: "In 1931 Prof. Aabbert Kocomrek of North Western University drafted a model statute designed to introduce and sanction prospective overruling:

*Section 1 :* The final decisions of the Supreme Court are:

- (a) Decisive of the rights of the parties;
- (b) Declarative of the rules of law for future application which govern the questions raised on the facts presented and decided.

*Section 2 :* (1) If the Supreme Court believes that a declaration of a rule of law theretofore made by the Supreme Court or by any inferior court is unjust, it will decide the instant case in accordance with the juster rule except—

- (a) Where the former rule is a basis of reasonable and justifiable reliance applicable to the facts of the instant case, or
- (b) Where the application of a new rule in its judgment will be unduly disturbing to a standard of reasonable and justifiable reliance as to the existence or non-existence of legal relations of other persons not then before the Court.

(2) When the Supreme Court refuses to depart from an existing rule in favour of what it pronounces a juster rule on

25. This is indeed what happened in the *Molitor* (Illinois) and *Muskops* (California) cases, although in the latter case, the end result was legislative reform broadly in accordance with the new judicial principle.

26. In his article in the *Journal of the University of Pennsylvania Law Review*, Vol. 109, 1960-1961; pp. 1—30.

27. *Ibid.*

the questions adjudicated, the expression of that view is evidence for future cases of the existence of reasonable reliance.

Section 3. Nothing herein shall abridge the duty of the inferior courts to apply the declarations of law made by superior courts.<sup>28</sup>

Cardozo, C. J. thought that judges had already the power to proceed along these lines. But should there be any doubt, he thought the power should be conferred explicitly by statute and he praised Kocomrek's draft as a satisfactory skeleton. So strong did he feel that if necessary, the statute should be reinforced by constitutional amendment.<sup>28a</sup>

In the *Sunburst* case,<sup>29</sup> Justice Cardozo said, "Traditionally a court overruling an earlier decision allows the new ruling to have a retroactive effect. *Sunburst*, however, is a striking case where a court has taken pains to make its new ruling not retroactive, and in so doing it cannot be said that the Court had infringed the Constitution of the United States."

Justice Black in *Moner v. Darrow*<sup>30</sup> and Justice Frankfurter in *Griffin v. Illinois*<sup>31</sup> have approved of the prospective overruling doctrine enunciated by Justice Cardozo. Justice Frankfurter thrust the declaratory theory (of Blackstone) into the morgue and blessed Cardozo's jurisprudential insight. He said:

We should not indulge in the fiction that the law announced has always been the law and therefore that those who did not avail themselves of it waived their rights. It is much more conducive to law's self-respect to recognize candidly the consideration that give prospective content to a new pronouncement of law.

(Note : The power of Supreme Court to review its own judgment will not be salutary if the doctrine of prospective overruling is also not invoked with a view not to disturb the series of chain reaction of action taken on the prior decision.)

Judge Frank in *May v. Hainer*<sup>32</sup> rightly observed:

The rational basis for judicial reluctance to overrule a gravely unsound decision, with not only prospective but also retroactive effect, would cease to exist if 'stare decisis' were treated .....solely as a sort of estoppel doctrine. Except when a person has detrimentally changed his position because of his knowledge of a decision,

28. Kocomrek's '*Retrospective Decision and Stare Decisis and a Proposal*' 17 A.B.A.J. 180, 182 (1931).

28a One wishes the model statute of Kocomrek is adopted in India.

29. *Great Nor Ry. v. Sunburst Oil and Ref. Co.*, 287 U.S. 358 (1932).

30. 341 U.S. 267, 275 (1951).

31. 351 U.S. 12, 20 (1956)

32. 153 H. 2 d. at 175.



I see no valid reason for adhering to a precedent when upon subsequent reflection it shows up as ill considered and unwise.

Mr. Justice Douglas in his Cardozo Memorial Lectures, deprecated the traditional masquerade under the Blackstonian theory of *stare decisis* as only revealing what the law really was, to be wholly out of date. He added: "But the more blunt, open and direct course is truer to democratic traditions. It reflects the candour of Cardozo. The full disclosure has as much place in Government as it does in the market place. A judiciary that discloses what it is doing and why it will breed understanding and confidence based on understanding is more enduring than confidence based on awe."<sup>33</sup>

So, we will endorse when we speak of Justice Subba Rao's candour; for verily he is the Indian Cardozo.

Beryl Harold Levy pithily concludes:<sup>34</sup>

Out of such refreshing honesty would come many benefactions. Not the least would be a reduction of the dead weight of redundant rationalisation in judicial opinions and a freer utilisation of earlier scholarly studies. Another negative advantage of no small importance would be a limitation on the 'anarchical proliferation' of our case law,<sup>35</sup> prospective overruling is only one of the many positive ways of placing newly formulated judicial law on a sound basis... For when we see a Judge as himself, a partial legislator in a period of legislative dominance, we shall be free to devote a disciplined and unencumbered imagination to the task of aiding judicial law makers to perform their duties with facilities more appropriate to their function.

### The Amending Power

As the entire controversy in *Golaknath's* case centres round the existence or the nonexistence of the amending power in its fullest extent in article 368, it is but necessary to shortly analyse the situation. Does article 368 contain only the amending process or procedure? What is the real distinction between ordinary law and the law made in the exercise of the Constituent Power? Hidayatullah J. answers the last question thus:

Under the scheme of our Constitution none at all. This distinction has been attempted to be worked out by several authors. It is not

33. Douglas '*Stare Decisis*' 4. Record N.Y.C.B.A. 152-175 (1949).

34. *Ibid.*, cited in U.P.L. Review, Vol. 109 (1960), pp. 1-30 at 30.

35. See Wechsler, *Reflections on the Conference*, III-Columbia Land Alumni Bulletin 2, Dec. 1958 p. 5—cited in University of Pennsylvania Law Review, Vol. 109 (1960-61) pp. 1-30 at p. 30.

necessary to quote them. Taking the results obtained by Willoughby<sup>36</sup> it may be said that the fact that a constitution is written as a constitution is no distinction because in Britain, Constitutional Law is of both kinds and both parts co-exist. The test that the Constitution requires a different kind of procedure for amendment also fails because in British Parliament by a simple majority it makes laws and also amends constitutional statutes. In our Constitution too, in spite of the claim that article 368 is a code (whatever is meant by the word code here)—articles 4, 11 and 169 show that the amendment of the Constitution can be by the ordinary law making procedure. By this method, one of the Legislative lists in a State can be removed or created. This destroys at one stroke the claim that article 368 is a code and also that any special method of amendment of the Constitution is fundamentally necessary.

According to Hidayatullah J., with which view one should agree, there is no difference between the ordinary legislative and amending process in so far as article 13 (2) is concerned, because both being laws in their true character come within the prohibition created by the clause against the State. In the Justice's view, Parliament "is not even a Constituent Assembly and to abridge fundamental rights in the name of the Constituent Assembly appears anomalous". For there can be no amending power extended to abridgement or extinction of fundamental rights. It is a pity that the fourth amendment brought radical changes. It did away with the distinction made by the Supreme Court between articles 19 and 31 and the theory of just compensation. This is nothing short of whittling down the right vouchsafed in articles 19(10)(f) and 31.

We may recall Dr. Ambedkar's words uttered in the Constituent Assembly:

"Now what is it we do? We divide the articles of the Constitution under three categories. The first category is the one which consists of articles which can be amended by Parliament by a bare majority. The second set of articles are articles which require two-thirds majority. If the future Parliament wishes to amend any particular article which is not mentioned in Part III or article 304, all that is necessary for them is to have two-thirds majority. Then they can amend it.

It is thus clear that Part III cannot bear any amendment. Dr. Ambedkar is clear about this. Why should not our Legislatures accept what Dr. Ambedkar had conceded rightly? Article 368 can by no stretch of sophistry be applied to Part III. The tragedy of it is that it has been

36. *Commentaries on the Constitution of United States*, Vol. III, pp. 686-687 (1933.)

applied in validating the first, fourth and seventeenth amendments. The Supreme Court was not alert. In fact it seemed to approve of it for a time till the jolt came from the time of *Sajjan Singh's* case culminating in *Golaknath's* case. An amendment of the Constitution is also 'law' and so article 13 applies to it. Subba Rao, C.J. put it tritely when he stated in the *Golaknath* case, referring to certain decisions in the United States. "It will be seen from the said judgments that an amendment of the Constitution is made only by legislative process with ordinary majority or with special majority, as the case may be. Therefore, amendment either under article 368 or under other articles are made only by Parliament by following the legislative process adopted by it in making other law. In the premises an amendment of the Constitution can be nothing but 'law'.

An amending power is no sovereign power. It must be a power specifically given by the Constitution. If it is sovereign, it is so only within the scope of the power conferred by a particular constitution. (per Subba Rao J.) . Article 368 only lays down the procedure for an amending bill to pass through. It will be noticed that the proviso refers to articles 54, 55, 73, 162, 241; Chapter IV of Part V, Part VI and Part XI, Seventh Schedule etc., but nowhere is mention made of Part III of the Constitution. This clearly indicates that Part III is not to be amended at all. Whatever changes needed can come under the restrictive clause empowering Parliament to enact laws in the interests of security of State, public order, in the interests of the public etc.

We will agree with Subba Rao, C.J.'s opinion that "there is nothing in the nature of an amending power which enables the Parliament to override all the express or implied limitations imposed on that power. As we have pointed out earlier, our Constitution adopted a novel method in the sense that Parliament makes the amendment by legislative processes subject to certain restrictions and that the amendment so made being 'law' is subject to article 13(2)".

There are a few misconceptions in the minds of critics of the majority view in the *Golaknath* case which may be pointed out and answered:

1. *Parliament is Supreme.*

Answer: It is not. The Constitution is Supreme.

2. *There is a dispute between the Supreme Court and the Parliament.*

Answer: No. Really the conflict is between the Parliament and the citizens whose rights Parliament seeks to infringe. The Supreme Court only decides the disputes between them.

3. *Amending Power is a Constituent Power.*

Answer: No. It is not. The amending power is conferred under the Constitution whereas the Constituent power is with the people who alone can confer on a future Constituent Assembly.

4. *The present Parliament is a better representative of the people than the Constituent Assembly.*

Answer: That may be so said if the heads of voters are counted; but the Constituent Assembly was convened in exercise of the Constituent Power conferred by the British Parliament by passing the Indian Independence Act, 1947. No such constituent power is conferred by the people on the present Parliament.

5. *Article 368 confers a substantive power.*

Answer : No. It deals only with procedure but even if article 368 confers a substantive power to amend, an amendment made in the exercise of that power by Parliament is nonetheless 'law' within the meaning of article 13(2). Whether it is a residuary power or power under article 368, it is only an amending power under the Constitution and not a Constituent power. Constituent power is only in the people. The people alone can confer that power on its representatives to make a Constitution. It is not a power under the Constitution.

### **What is the proper future course of action?**

One thing is clear. The old law as expressed in *Shankari Prasad's* case is no longer there. There is no possibility of the Supreme Court re-considering this overruled decision. *Golaknath's* case will stand 'put', so far as overruling of *Shankari Prasad* and *Sajjan Singh's* majority opinion is concerned. May be we may have a rehash of what is prospective overruling and what flows from it. This may be achieved by another application under article 143 if the Government so thinks fit.

Now, therefore, it is best to proceed on the basis that constitutional law is also 'law' within the meaning of article 13. Once this is conceded, the habit of the Legislature in seeking constitutional amendment for altering the scope of fundamental rights will have to be given up. In its stead it is wise to train our draftsmen to forge ahead the necessary laws in tune with the restrictive clauses in Part III of the Constitution.

Taking article 14, the Legislature may not go headlong in further classifications, nullifying the equality clause. The judiciary have had their lion's share in destroying this clause, by upholding all classifications as good. The judiciary may henceforth show some restraint in this direction.

The Legislature have ample scope to give equal treatment by enacting suitable laws so as to fall in line with the principles enunciated in articles 15 and 16. Discrimination on grounds of religion, race, caste or place of birth are clearly taboo. While equality of opportunity in the matter of public employment is welcome under article 16, the damage done by the judicial verdict in *Rangachari's* case may as well be repaired by adding a proviso to article 16, namely, that reservations of post for backward classes are to be at the stage of appointment and not promotion to selective posts. This will be quite in keeping with the *Golaknath* case doctrine, as the proviso only explains the right and does not whittle down any existing right. The *Rangachari* decision alone is an unwarranted extension of a right. This is necessary to ensure efficiency in the civilian services. Merit must not be sacrificed for all time at the altar of encouraging backward classes to the detriment of the nation's progress. Will the Legislature correct the judicial error by the said amendment?

There is nothing wrong if article 17 as to abolition of untouchability is really given full effect in execution. The defect lies in not seeing to the execution of the policy.

As to the seven freedoms in article 19, the State may well bring all its welfare legislation in the interests of public good by enacting laws within the sphere of the restrictive clauses (2) to (6) of that article. This ambit is large enough to bring into effect all the directive principles of State policy adumbrated in Part IV of the Constitution. Not enough attention was paid in this direction and draftsman had not been trained to think of this large vista as hitherto under the aroma of *Shankari Prasad's* case they were lured to resort to only constitutional amendments. The constitution is rendered dynamic by the operation of these restrictive clauses in Part III, as to freedoms of speech, assembly, association, movement, residence, acquisition and disposal of property and practice of profession etc. It will be quite in consonance with reasonable restriction doctrine if in article 19(2) the words 'in the interests of contempt of Parliament' are added. This will not be a transgression of the *Golaknath* case.

The code of criminal jurisprudence set out in clauses (1) to (3) of article 20, as to double jeopardy, *ex post facto* laws and self-incrimination must be strictly adhered to by the Legislature in the enactment of any law.

The protection of life and personal liberty under article 21 demands a better appraisal at the hands of the Judiciary than what was pronounced in *A. K. Gopalan's* case. Government must not feel shy if on a proper future occasion, a more liberal interpretation as to rules of natural justice

and the tenets of 'due process' are envisaged as embedded in the concept of liberty in article 21.

Article 22 as it is harsh on the persons in detention as to hearing and judicial remedies It is for the Legislature to give a fair deal to the detenues by appropriate changes in the Preventive Detention Act.

Articles 23 and 24 which refer to rights against exploitation do not offer any problems. In regard to rights of freedom of religion (article 25 to 28), legislation must tend to protect minority rights to run their educational institutions with full freedom and to protect religious institutions in the management of these properties. These arise under articles 29 and 30 also.

It is to article 31, right to property, much attention has to be paid. Much of the tussle between the Legislature and the Judiciary is on account of this. If article 31 were not in Part III but in a separate part like Freedom of Trade and Commerce, different considerations will arise. The damage to article 31 by the constitutional fourth and seventeenth amendments has been immense. Though the compensation clause has been nearly nullified to mean 'any compensation' the Legislature has got to get accustomed to the concept of 'compensation' as envisaged in the *Metal Corporation* case.<sup>37</sup> May be they may not like the interpretation that compensation must be akin to market value to be just. They, however, have a silver lining in Justice Hidayatullah's approach which leaves scope for a reconsideration of this aspect. According to this Justice, compensation has to be real and not 'any nominal value', though not necessarily the full market value. Herein lies the golden mean approach. The Legislature may well await further judicial enlightenment in this regard on a future appropriate occasion.

With reference to article 32, it is so fundamental that the Legislature as well as the Judiciary must respect in full the import of the protection offered by that article to the citizen of India.

### **What course the Government has to follow *vis-a-vis* Constitutional amendments**

There are two suggestions, one by Chief Justice Subba Rao and another by Hidayatullah J. with respect to solving the tangle and obtaining for Parliament the specific power to amend fundamental rights. We submit if, as the Justices say, rights in Part III are sacrosanct and fundamental, it is difficult to conceive how they can be amended by any power derived by calling in a new Constituent Assembly. It looks as

37. *Union of India v. Metal Corporation of India*, A.I.R. 1967 S. C. 637.

if it will be a new Constitution altogether following a revolution, peaceful or otherwise.

Chief Justice Subba Rao appears to suggest that in entry No. 97 of List I in Seventh Schedule, there is a residuary power by which a new Constituent Assembly can be convoked. It may not be appropriate to put entry No. 97 to such immediate use. Hidayatullah J. would however add: "Parliament must amend article 368 to convoke another Constituent Assembly, pass a law under item No. 97 of the List I to call a Constituent Assembly and then that Assembly may be able to abridge or take away the fundamental rights, if desired. It cannot be done otherwise." The Justice then adverts to Parliament being a constituted body and not a constituent body. As a constituted body, Parliament has powers of legislation which include amendments of the Constitution by a special majority but only so far as article 13 (2) allows. So the Justice wants a Constituent Body as stated earlier. The Justice would say that though the State is a sovereign body but yet since it has chosen under the Constitution to create self-imposed restrictions through one constituent body (Constituent Assembly of 1947) those restrictions cannot be ignored by a constituted body (the present Parliament) which makes laws.

It is, however, apparent that Justice Hidayatullah has merely elaborated what the Chief Justice said, in a reasoned manner. To us this also rests in a fiction that the so constituted second Constituent Assembly or body represents the people's voice. It is not clear how this is done in its details as to representation of all States and the minorities. Sovereignty yet resides with the people of India; if they parted with it in a measure in 1947 to the Constituent Assembly, that can go only so far as the present Constitution is in vogue. Once you want to create a new Constitution, you must visualize that the people's sovereignty is affected in the ultimate analysis in the democratic Republic of India. The Preamble clearly makes the people of India resolve to create a Sovereign Democratic Republic to secure justice, liberty and equality to themselves, as envisaged in the present Constitution. If a new Constitution has to be forged with a new approach to the concept of liberty etc., the people must again resolve by themselves as to what it should be. The methodology of directly enabling Parliament to call a Constituent Assembly appears improper and illegal. The only method appears to be a referendum.

The referendum must be addressed to all voters of India to reply to this question:

"Do you want the fundamental right (state here: the relevant right) assured to you in Part III, to be subject to constitutional amendment?"

If on this question more than 2/3rds of the electors answer 'yes, we want Part III of the Constitution to be subject to constitutional amendment' then, Parliament must be duly empowered to call for a second Constituent Assembly to work out the new article of amendment. Such a Constituent Assembly may be then formed by Parliament under the residuary power in item 97, List I :

- (1) with all members of the present Parliament, both of Lok Sabha and Rajya Sabha,
- (2) with ten members elected specially from among the members of each legislative body in each of the sixteen States, *i. e.*, ten from the Assembly and ten from the Council of States wherever that exists. These ten members will be elected from all political parties, the number being proportionate to their actual strength in the Assembly or Council as the case may be.

This will in a way ensure a fair representation to all political parties in the proportion in which the people had chosen to elect them. This will give also weightage to the opinion in all the States.

So to enable all this, a preliminary requisite is a referendum. For this a new provision, as article 368-A, has to be enacted by Parliament by the method and process postulated in article 368. The new article 368-A may contain words to the following effect :—

**Art. 368-A**

(1) Where it is necessary to

Ascertainment of the people's views by means of a referendum.

- (a) amend any of the rights postulated in Part III of the Constitution,
- (b) or to ascertain the wishes of the people of India in a matter of special constitutional importance, not solved by any of the existing constitutional provisions, a referendum may be caused to be effected by law.

- (2) After ascertainment of the wishes of the people of India by such a referendum, Parliament may in its residuary power vested in it by entry 97 List I of the Seventh Schedule call for a Constituent Assembly to formulate the necessary amendment of the Constitution.
- (3) Such a Constituent Assembly shall consist of the members of both Houses of Parliament and ten members duly elected from



among each of the Legislatures of all the States, in proportion to the strength of political parties functioning in such legislatures at the relevant time.

The law as to referendum may be duly enacted under article 368-A aforesaid empowering the Election Commissioner of India to hold the referendum as to the particular issue to be placed before the people. The Election Commissioner shall ascertain from each voter in India his answer to the question as 'yes' or 'no'. If he finds that more than two thirds of the total number of voters have answered the question in the affirmative, he shall record such a finding and recommend to Parliament the need for calling a Constituent Assembly as envisaged in article 368-A. By two thirds of the total number of voters is meant as in the Voters' List and not from among the voters who actually polled. If more than two thirds of the voters did not turn up for the poll it must be then deemed that the people are for the *status quo*.

All this is new and cumbersome. It is also costly to the nation. This should be a deterrent to any fetish for constant or needless tempering with the Constitution. But there is no escape from it if you want changes in the basic and essential structure of our Constitution.

This appears to be the only way. The Bill currently initiated by Shri Nath Pai enabling Parliament to amend fundamental rights if passed into law, will again be subject to the scrutiny of the Supreme Court. Except that it will provide another occasion for the Court to decide whether it will stand by the *Golaknath* case or revert back to *Shankari Prasad's* case there appears to be no other purposeful achievement contemplated in this move. The law of the land is what the Supreme Court says as to the present Constitution, and not what Parliament wishes it to be. The Union Government may possibly be thinking of moving the Supreme Court under Article 143 for a detailed opinion as to matters that required to be solved in the light of the *Golaknath* case. That might help to some extent by bringing more clarity and shedding light amidst dark corners. But none of these will solve the problem except a recourse to the method of referendum and the subsequent invoking of a Constituent Assembly in the manner suggested above.

The following further points deserve consideration :

1. It is said that though the Parliament cannot take away or abridge the fundamental rights, it can amend article 368 by conferring such power on it to take away the said rights. This is begging the question. If the amendment is law, such an amendment would equally violate article 13 and, therefore, would be void.

2. In view of the judgment of the Supreme Court, the Parliament cannot now amend the Constitution to take away or abridge the fundamental rights. The only way out is to raise the point again in the Supreme Court in some other case and try to get the previous decision reversed. If the Parliament now amends the Constitution in the teeth of Supreme Court judgment, there will be a deadlock, for under article 144, all authorities, civil and judicial in the territory of India shall act in aid of the Supreme Court. If the Parliament disobeys the judgment of the Supreme Court, that is the beginning of the end of our Constitution.

3. The judgment of the Supreme Court does not in any way prevent Parliament to carry out all its intended agrarian reforms, for all the amendments are left in tact. So far urban areas are concerned, it is still open to the Parliament to make laws of reasonable restriction in public interest encroaching upon the fundamental rights. So far acquisition of lands are concerned, the judgment of the Supreme Court do not preclude the Parliament from evolving the reasonable principles of compensation.

4. The judgment of the Supreme Court also does not preclude the Parliament from adding new rights of the people in the Fundamental Rights Chapter, such as right to work, right to education, right to livelihood, etc., which now find a place in the directive principles.

# *The Indian Judiciary and Amendment of the Constitution*

(A POLITICAL ANALYST'S VIEW OF GOLAKNATH'S CASE)

• K. V. RAO†

THIS PAPER IS a direct reaction of mine to the judgment given by the Supreme Court in *Golaknath's* case. I need not hide here my first reaction when I heard it on the radio. It was one of shudder. Whither Indian judiciary, I thought, for at one stroke it destroyed my faith in the permanence of the Constitution and its supremacy over statutory law along with the sanctions behind it.

This paper is divided into four sections. In the first section, I discuss the general role of the intelligentsia and of the judiciary as protectors of the political culture of the country and also the accepted role of the judiciary in the Indian Constitution. In the second section, I give certain additional arguments and facts which, I thought, were not properly presented before the Supreme Court, in the hope that they would be useful for a future Court. In the third section, I discuss some of the undesirable consequences flowing out of the present judgment; and in the fourth section I discuss ways and means out of the present impasse. The whole paper, I submit, is the reflections of a social scientist, a political analyst.

## I

### **Judiciary and the Constitution**

I start with an apology. I must be clearly understood. This paper is highly critical of the judgment of the Supreme Court in *Golaknath's* case, but it does not mean that I am disrespectful either to the Judges personally or to the Court as an institution. I look to the Court as the protector of the Constitution as well as of my individual liberty. I would

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rather trust the Supreme Court than the majority in the Parliament for safeguarding my liberty and honour, but under the Constitution. At the same time, I would like my representatives but not the Courts to decide, on my behalf, under what Constitution I have to live. That is the meaning of democracy, of self-rule, befitting 'the dignity of the individual' of the Preamble ; and there can be no other meaning. But this judgment shatters that view.

### My Special Angle

I am looking at this judgment and its far-reaching implications in a dual capacity—from the point of view of a citizen and also that of a social scientist, of a skilled technician. Practising lawyers, judges and legally-trained statesmen are also skilled technicians; and there is a common ground between us all. I am a political scientist and a student of constitutions. They are all legal experts, studying and expounding constitutions and statutory law, in terms of the language of the constitution. Thus constitutions and their language is common between us, and also the mode of analysis as well as the analytical tools. But they move in the legal groove, and think of constitutions in terms of 'law', understood in terms of certain established rules of interpretation, while all social scientists talk of constitutions in terms of social systems, of power politics, and the latter as a means of social control. This makes a lot of difference, a fundamental difference. But again our goals are the same—social stability and social justice.

Our fundamental difference is, as I implied above, that constitutional law is not mere law. It may be a species of law, but the relationship is so removed from statutory law that it almost becomes a genus by itself. Thus expounding constitutional law is nothing but an exercise in the exposition of political philosophy mixed with the political culture of a country and with a dose, alas, of one's own personal value-system. Mostly, it is a question of commonsense analysis, in the uncommon way. For instance, in the whole of *Golaknath* judgment, there is no 'legal' interpretation at all, in the ordinary sense; it is based on judicial interpretation which gives the lawyers and judges a capacity to shift evidence and arrive at truth 'objectively'. We social scientists are also trained to use the same analytical tools, and also more. What ultimately resulted is that this judgment had become a matter of 'opinion', and our opinion also is worth mentioning.

### The Stakes

The stakes in this case are very high. The stakes are not the right to property—the Supreme Court has still kept us under the 'totalitarian

rule" of the three "bad" amendments (I, IV and XVII)—nor are the stakes the "unalterable nature" of our fundamental rights—after all, the Supreme Court has suggested a more easy way of changing them. What is at stake really is the future of our political system and of our political culture consequent on the claim of the Supreme Court not only to protect our democratic rights under the Constitution, in the role of Patanjali Shastri's "sentinel on the qui vive", but also to prevent "totalitarianism" of the very Constitution. Again, what is at stake is the claim of the Supreme Court not only to make 'the law' but also to make the Constitution.

Let us see. The whole judgment and the whole controversy hangs around the significance of "law" in article 13 (2), and consequently also the whole philosophy of the Constitution, as it did once on a similar interpretation of law in article 21 in *Gopalan's* case.

The basic questions are: is constitution "law", and is it the same as statutory law? Before John Marshall, no constitution treated it so, nor did any entrust it to the courts to enforce it; and even today, many countries, notably England, France and Russia, do not do so, that too though the latter two have written constitutions.

The greatest significance of John Marshall's judgment is not merely that he introduced judicial review—before him, Sir Edward Coke had attempted it but failed—but that he treated constitution as "law" at all. That was the first *coup* staged in constitutional history.

And today, in our country, our Supreme Court has staged the second *coup*. All that John Marshall claimed was that he would treat the constitution as a sort of law, as constitutional law, but supreme law. He never equated constitutional law with ordinary law, nor did he ever question the constitution or its wisdom.<sup>1</sup> What our Supreme Court has done in this case is that it equated constitutional law with statutory law; and it questioned the constitution itself and also the wisdom of the amendments.<sup>2</sup> Again, all that Marshall claimed was to say what the Constitution is, while Chief Justice Subba Rao claims to say what the Constitution ought to be. This has no parallel in constitutional history. It is a *coup* because it usurped a power which was never intended, as the Supreme Court in

1. Even in England though made through the same legislative process, constitutional pundits as well as political scientists do maintain the distinction.

2. Statements having this tendency:

(i) Justice Hidayatullah's view that article 31 has no place in Part III.  
 (ii) Chief Justice Subba Rao's view that fundamental rights are paramount and should be preserved and that the country was getting totalitarian and should be prevented.

this very judgment has said, "the Constitution is Supreme" and the Court is a creature of the Constitution and co-ordinate with Parliament. The Court has to work under the Constitution and not sit over it and over-step the jurisdiction of other organs.<sup>3</sup> In the language of Bacon, changed to suit the present context, "judges are lions, but lions under the Constitution, but not on the throne". Thus our Courts should exercise the same restraint as the English Courts, substituting "Constitution" for the "King" and always feeling—"We are the Constitution's Courts; we have to enforce it and not to make it". *The Supreme Court should not assume the power to say which amendment is relevant and which is not—nobody gave that power to them; and even if they claim this, they can certainly not claim as they do here—and this is my serious complaint—the power to say that the "unconstitutional" constitutional amendments (I, IV and XVII) are still a part of our Constitution.*

*Let me emphatically say that the Constitution is not a mere legal document; it is much more than that and its basic character cannot be changed simply because it is liable to be amended, as directed by the Constitution itself, by a Parliament, and it is given to the Supreme Court to interpret it again under the Constitution—a sovereign commands what he permits. A constitution works by political culture and constitutional morality; and just as the basic nature of the family is much more than what is legally formulated or decided by case law, the basis of the constitution is also much more than what the document or the court says.*

The Constitution is what the people want it to be, as decided by their representatives, as befitting their political culture, whose promoters, preservers and protectors are the intelligentsia including political and social scientists, judges, lawyers, etc. This Constitution does not permit the judges alone to substitute their own ideas of how it should be in the place of what we, the people, want.

This judgment contains enough evidence of a tendency towards a system of government against which the judges reacted so much in this very case—*paternalism*, of course, of a variety, of a species of totalitarianism, a sort of not only a government by the judges but also a constitutional basis and political culture as decided by the judges. By making use of a doctrine applied in another context, namely, of "prospective overruling", the Court has asked us to live under constitutional provisions which are not constitutional.

This amounts to the judges not merely claiming to make law—which is itself objectionable—but claiming to make the constitution. If the judiciary

3. That this is the general tenor of this Constitution is admitted by this judgment.

is allowed to make the constitution instead of the people, it amounts to transferring the Crown of James I to the head of the Judiciary, ignoring the long struggle of the people for establishing democracy for the last several hundred years in between.

By all standards, constitution-making is a political matter, and it is for the people to decide for themselves; and talking of the worst, if the people decide to have a totalitarian system of government, the judiciary as such has no business "to protect" the people from that totalitarianism. That is the correct position, in the simplest terms. It is commonly accepted in all countries that the judiciary should not involve itself in political matters. Our judiciary should also pay heed to this. Our judiciary has certainly entered the forbidden field when it expressed its great desire to achieve through this judgment a prevention of the growing tendency towards "totalitarianism" and also prevention of fundamental rights becoming "the plaything of the special majority"; and this is a dangerous tendency and the camel must be stopped before it makes a further entry into the Arab's tent.

Again, the Supreme Court in this judgment has "laid down" certain jurisdictional limitations regarding the application of "prospective overruling", which again amounts to making the Constitution, a power which it has usurped from the Parliament against the Constitution.

## II

### The Bases of the Supreme Court's Conclusions

Now, we do not question either the right of the Supreme Court to give its judgment, nor question its objectivity, impartiality and its supreme wisdom, acquired by long judicial training and experience. Somebody should have a final say in purely legal matters, and the Constitution gives that right to the Supreme Court; and we must abide by it. At the same time, the minority judgments in *Sajjan Singh's* case and in the case of *Golaknath* show clearly that there could be honest differences of opinion; and the very fact that the Supreme Court itself has revised its own previous decisions, indicates that there is always scope for improvement.

It is in this light that I desire to indicate here some flaws in their arguments and some new facts which probably had not been presented before the Court, along with some consequences that flow from this judgment, all of which might influence a future Bench to reconsider this decision.

The most interesting part of the judgment is that, as a support for arriving at this final decision, the Supreme Court has tried to depend upon, and give prominence to, certain things, which the Supreme Court

refused even to touch, in general so far, for strict legal interpretation. I am particularly referring to the use made by the Supreme Court of the Constituent Assembly Debates, and to the Court's attempts to arrive at "the spirit of the Constitution" from, among others, a special emphasis on the Preamble. It gives me particular satisfaction because I have been an advocate of their use all along, and I made ample use of them myself in my own book on the Indian political system.

### Article 13 (2)

Particularly, the Constituent Assembly Debates had been a forbidden fruit right from the beginning, from *Gopalan's* case in 1950. Now that the Supreme Court has just started tasting it, let us eat more of it, to find out the truth.

Unfortunately, it does not seem that all the facts relating to the proceedings in the Constituent Assembly, had been fully presented before the Supreme Court<sup>4</sup>. In fact, a real understanding of the Constitution-making is not possible without reading from the very beginning of the Constituent Assembly Proceedings. This is essential for understanding the meaning of article 13 (2) as well as that of the present article 368.

As far as article 13 (2) is concerned, the Constituent Assembly Debates are of no particular use, because they could be used for arriving at both the conclusions for the disputed meaning of "law" therein.

This article was first recommended by the Interim Report of the Fundamental Rights Sub-Committee, which was discussed by the Constituent Assembly on April 29, 1947. It was then in a crude shape and several amendments were suggested including the one moved by K. Santhanam which read "nor any such right be taken away or abridged except by an amendment of the Constitution." Santhanam particularly gave this reason for moving his amendment that "if this clause stands as it is (that is, without his amendment) then even by an amendment of the Constitution, Fundamental Rights could not be changed". Patel who followed immediately "accepted" Santhanam's amendment, and it was adopted by the Constituent Assembly. And when passed, the clause read like this: "All existing laws, notifications, regulations, customs or usages in force in the territories of the Union inconsistent with the rights as guaranteed under this Part of the Constitution, shall stand abrogated to the extent of such inconsistency, nor shall any such right be taken away or abridged except by an amendment of the Constitution."

4. The Supreme Court seems to have developed a practice of not looking into any thing unless presented before it by the lawyers; but I am subject to correction here.



It is interesting to note that while announcing the adoption of this clause, the President, Dr. Rajendra Prasad, concluded by saying that "the Constitution will provide rules for its own amendment.....This clause also if necessary may be amended in the same way as any other clause in the Constitution."<sup>5</sup>

What is important to note, however, is that when the Draft Constitution was published, Santhanam's amendment, as quoted above, was dropped, and more important to note is that Punjabrao Deshmukh gave notice of an amendment similar to that of Santhanam but did not move it, without giving any reasons. Thus the history of this article in the Constituent Assembly clearly shows nothing—the omission might be due to the Constituent Assembly thinking that fundamental rights should never be amended; or, equally, it might be that both the Drafting Committee and the Assembly thought it to be superfluous under the conviction that the definition in article 13 of 'law' did anyhow exclude constitutional law.

### Fundamental Rights

The Supreme Court has quoted a learned author, as well as Pandit Jawaharlal Nehru, to show the permanent nature of fundamental rights; and it also quoted Dr. Ambedkar to show that the Constituent Assembly meant them to be 'unalterable'. I beg to show here respectfully that a closer examination does not support the contentions of the learned judges.<sup>6</sup>

Fundamental rights are 'fundamental' in several senses, but many authorities agree that they are not 'unalterable'. Their dynamic nature is accepted and is supported even by this judgment. The context in our Constitution clearly shows that they are the decision of the Permanent Will, and so beyond the reach of the Temporary Will. It is common knowledge that the Constitution itself makes these rights elastic in ordinary times and also suspendable in Emergencies; and there is also a view held that the rights are so elastic that the Congress Party could have easily achieved their socialist pattern without amending the Constitution at all. But to quote Pandit Jawaharlal Nehru, as the Supreme Court has done, to prove the permanency of the fundamental rights, is unfortunate. What Pandit Nehru was doing by that particular speech was that he was trying to show the permanence of the Constitution when compared with statutory law but not the permanence of fundamental rights when compared with other provisions of the Constitution. Actually, on the contrary,

5. *C. A. Deb.*, Vol. III, p. 417.

6. A discussion whether fundamental rights in general were transcendental or not, was only incidental, if not irrelevant. The only question before the Court for decision was whether they were unalterable in our Constitution.

Pandit Nehru on several occasions referred to the 'sovereignty' of Parliament and its right to change even fundamental rights,<sup>7</sup> and even gave notice of a provision that all parts of the Constitution including fundamental rights could be changed by an ordinary procedure in the first five years of the Constitution.

Similarly, the Supreme Court has quoted Dr. Ambedkar to show that he meant Part III to be 'unalterable'. Now, it is true that the Debates show that he said like that in the Assembly; but for anybody that has read all the Constituent Assembly Debates minutely, it is clear that there is absolutely no basis for that statement. Either Dr. Ambedkar was making a rash statement—he did make several such—or it was a printing mistake—there are several such printing mistakes also in the Debates. These mistakes had occurred because Dr. Ambedkar was trying to prove something else and so his focus was not on the permanency of the fundamental rights, as the Supreme Court supposed.<sup>8</sup> Actually, what Dr. Ambedkar was labouring hard to prove was the comparative flexibility of the Constitution but not the comparative rigidity of Part III. Throughout the proceedings of the Constituent Assembly not even one member did at any time refer to the non-amendability of Part III. Dr. Ambedkar himself had three occasions to refer to this point and at no time did he say that they were non-amendable. On all these occasions, he classified the articles according to their flexibility—with simple majority, with 2/3 majority and with 2/3 majority coupled with concurrence of the States—and on no occasion did he say that there is a fourth class of non-amendable Part III. Even in this particular passage quoted by the Supreme Court, the exception of "Part III and article 301" was with reference to amendability by 2/3 majority, i.e., with reference to the requirement of States' concurrence, and not to non-amendability at all. This passage should not have been quoted at all by the Supreme Court in support of their stand, even if it was for an indirect support.

Another aspect that has not been presented before the Court seems to be the significance of "State" of article 12 making "law" in article 13. It is absolutely clear to all students of constitutional law that the State itself is the creature of the Constitution, and even if it could make a Constitution, "State" as understood by article 12, i.e., Parliament, can never make the Constitution. So, two conclusions follow:

- (i) that "law" in article 13 excludes constitutional law (as Parliament cannot make the Constitution); and
- (ii) that the agency that amends the Constitution under article 368

7. For instance, see *C. A. Deb.*, Vol. IX, p. 1195.

8. This judgment also contains one or two of such mistakes.

is a sort of Constituent Assembly. That is, when Parliament acts under article 368, it becomes a constitutional convention.

### Article 368

The controversy is whether article 368 gives the plenary power to amend or prescribes only the procedure. The *Golaknath* judgment takes the latter view. While both views are possible—it is only a matter of majority opinion—one important point seems to have been not presented before the Court. The general pattern of the present Constitution is that it has been divided into several Parts with titles and sub-titles, and articles have marginal notes. The Supreme Court has only recognised the importance of marginal notes, but not yet fully of titles and sub-titles. Thus nowhere does the Constitution say that “there shall be equality” or that a person has “right to life and personal liberty”. Both articles 14 and 21 start negatively, which means, that, as Alladi Krishnaswamy Ayyar pointed out, it is assumed that a natural right existed which is implied by the sub-title ‘right to equality’ and the marginal notes. Similarly, a separate Part with a title in bold letters must be taken to imply that Article 368 assumes that the Constitution contains a power to amend itself in this article. Otherwise it is interesting to note that nowhere does the Constitution say in Part V that Parliament can make a ‘law’.

The Supreme Court has ruled that the amending power is derived from Part XI, articles 245, 246 and 248, and also quoted Justice Mudholkar’s opinion in another case, with approval, that whatever comes out from legislative procedure of Parliament is “law”.

Now Justice Mudholkar’s opinion amounts to over-simplification. Our Parliament, like that of the English Parliament, is not merely a law-making body. It passes Resolutions, passes votes of no-confidence, takes part in the election of the President and the Vice President, impeaches the President and others, and all this cannot be called law-making or legislative procedure. Thus impeachment is a sort of judicial process without Parliament becoming an actual Court, and similarly amending the Constitution under article 368 is a sort of ‘Constituent’ process without actually becoming a Constituent Assembly. The judicial procedure followed under article 143 does not make ‘advisory opinion’ a ‘judgment’ of the Supreme Court.

If we accept the Supreme Court’s view that the power to amend is derived from articles 245, 246 and 248, I am not able to understand from the summary of the judgment at my disposal which exact article the Supreme Court meant—we land ourselves in another difficulty. While

9. Except indirectly in Part XI.

"amendment" is not included in the VII Schedule, List I, the Supreme Court does not appear to see the force of "exclusive" in articles 246 and 248.<sup>10</sup> How can article 368 which requires concurrence of State Legislatures in its "procedure" be reconciled with "exclusive" in those articles? The doctrine of harmonious construction requires that we accept that article 368 "confers" the power to amend, at least by implication; (unless one of my ingenious friends tells me that this power is derived from the Concurrent List, item 20, "Economic and Social Planning"!).

The history of this article in the Constituent Assembly also lends support to this thesis—but I do not want to elaborate it here.

### "Prospective Overruling"

It is through this doctrine that the judgment plays what the lawyers call a "fraud" on the Constitution—make "unconstitutional" articles constitutional and confer jurisdiction upon the Supreme Court and define that of the lower Courts—all powers which the Constitution expects the Parliament to exercise [articles 32 (3), 138, 139, 140, 230, 255, item 65 of State List, etc.] Prospective overruling is not entirely new to India, nor is it exclusively used only by judges. The judiciary has used it in India in some form in several cases. But mostly, to my knowledge, the Courts in America applied it to cases involving administrative acts and judge-made rules, and rarely to constitutional cases. Yet, its application at all in this case is not the novelty here.

The novelty here is the giving of life and currency to a dead amended article of the Constitution. As far as I understand its application in the U.S.A. and in India in its amorphous or implied form,<sup>11</sup> whenever a new interpretation or decision is given, it is clearly stated or implied that the rule or law or act that is impugned becomes dead once for all. Only the consequent mischief of such dead acts is condoned; but as far as the future is concerned, the rules or laws so declared *ultra vires*, have no prospective operation. In other words, the law is dead and gone *ab initio*, only the mischief already done was condoned. But Justice Subba Rao's application has two novel departures. First, he applied it to constitutional amendments to declare them *ultra vires*. This has been never

10. As a matter of fact, but for the marginal title article 248 does not clearly confer 'residuary power'; read by itself, it only reiterates article 246, especially because it does not have the usual safety-valve "notwithstanding....." Residuary Power is conferred by item 97 of List I also.

11. Thus if a man was imprisoned on a false charge or under a wrong interpretation and discharged later, or when a man was hanged and later the law was declared *ultra vires*, 'Prospective Overruling' is inherent in the situation, even in India.

done, to my knowledge, in America.<sup>12</sup> Second, he gives continued life to a dead act, an act which he declares as *ultra vires*—all constitutional amendments are legislative acts for him—and gives them future operation, which is also not done anywhere. In short, if a constitutional law or statutory law is found *ultra vires*, it is dead from the very beginning, as if it was still-born. But the Court says they are still alive.

It is through this novel application that this judgment asks us to live under a constitution which is not a constitution. The Court has got the power to say at the most what is Constitutional and what is not. But under what provision of the constitution has it got the power to say that what is not constitutional is constitutional, a power which through this very judgment the Court denies to the Parliament?

### III

#### Consequences of the Golak Nath Case

There are many consequences flowing from this particular judgment which require greater appreciation on the part of all intelligentsia including judges, parliamentarians and social scientists. These consequences may be divided into two kinds—indirect and direct.

Indirect consequences are those described as political. Without meaning anything bad or imputing any motives, I want it to be impressed on all what dangerous impact this decision would have had and what use to which the political parties would have put it<sup>13</sup>, if it had come before the Fourth General Election of 1967, especially in view of the unhealthy precedent (unhealthy from the political culture point of view) set by (the then) Chief Justice Subba Rao of letting it known that he was standing for a political office while holding the highest legal one. A general warning seems invited here to all and especially to the Judiciary, against defying the Constitution by overstepping the legal jurisdiction and entering the political one; in that case, 'legitimacy' would be lost:

12. When Chief Justice Subba Rao says that : it "is now accepted in all branches of law including constitutional law" in the U. S., what he perhaps means to say is that it is applied whenever constitution is given a new interpretation, *e. g.*, to equality and "due process" in the segregation cases. I do not know much here about the American practice, but to the extent my knowledge goes, this seems to be the correct position.
13. The opposition would have made capital against the Congress Party of such implications and insinuations as that these Amendments were leading us towards "totalitarianism", that fundamental rights had become "a plaything" etc. especially in view of what Gajendragadkar, C. J. was saying in previous judgments that all this was done in pursuance of the socialist policy of the party in power.

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a fresh Constituent Assembly from time to time under this residuary power.

I do not think that this was ever the intention of either the original Constituent Assembly, or even of the Judiciary that made the suggestion, that the Constitution should be the plaything of a simple majority but not that of a 2/3 majority that too of the creature of a creature. But that is the consequence of it, against which we have now to take a strong precaution.

A major consequence, which directly flows from this judgment, though common to many such judgments, requires a special mention here—it leads to needless litigation. This particular judgment has solved, if at all (because another Court might alter it) only one point by coming to two conclusion and leaving out as many as six issues for future decisions. By pointing out that these issues could be taken up later<sup>14</sup>, the Supreme Court is opening the flood-gates of litigation, because in future all 'decided' cases could be re-opened, almost every day; and there will be nothing like even a comparative 'permanent law' of the Constitution. This is the very negation of rule of law and of democracy—even this judgment is not 'final', as it could be changed by another Court.

#### IV

##### Action for Future

The problem now is what to do after this judgment. After all, the Constitution, as Alladi has said, has left the power for interpretation to the Judiciary; and coming, as it is, from the highest body, we have to respect it, we have to obey it, as any thing done or said against the judgment of the Supreme Court, will only dig out the very foundation of our stable political society.

At the same time, it is impossible for the intelligentsia or even the ordinary citizen of India to accept the proposition which flow from this judgment that fundamental rights are always unalterable. Many of us are convinced that the judgment of the Supreme Court is unfortunate and is capable of immense mischief; but for the present, it is binding.

A way out should be found and this must be for solving the immediate problem and make it possible somehow to amend the Constitution to meet the requirements of the situation from time to time, and also for

14. The Court has "laid down" on the use of "prospective over-ruling", in item (3): "the scope of the retro-active operation of the law declared by the Supreme Court superseding its 'earlier decisions' is left to its discretion to be moulded in accordance with the justice of the cause or matter before it". It is a pregnant statement, pregnant with litigation.



solving the ultimate problem of preventing such possibilities of the fundamental law of the country becoming the plaything of 'one-man majority' of the Supreme Court.

### **Immediate Problem**

First, the immediate problem. We may begin by considering here some of the suggested remedies. We have already seen the remedy suggested by the Supreme Court itself and noted several very serious objections to this proposal of the Parliament setting up a Constituent Assembly under its residuary power to alter Part III. This need not detain us here.

Another suggestion made in some quarters that either article 368 or article 13(2), or both of them, may be amended to meet the present impasse, looks, no doubt, attractive, but there is still a danger of the amendments being declared unconstitutional on the ground that they are likely to reduce or abridge the fundamental rights guaranteed by the Constitution. This will also be a perpetual danger, even if not immediately, as a future Court may declare them unconstitutional, and once again the country may be faced with an avoidable worry.

A third suggestion in the air among some quarters is to resubmit the whole case once again to the Supreme Court in the hope that a new combination of judges may give a different decision or suggest a way out. This can also be done by the President seeking advisory opinion under article 143. This remedy also exposes us to the same danger as the above, namely, that it makes it subject to possibilities of reversal of judgments by subsequent Courts. This would not serve our purpose.

Having considered the suggested remedies, I have one or two to offer. First, the President could make a declaration under article 359, as there is now an Emergency, taking away the right to approach the Supreme Court for enforcement of any of the articles in Part III and giving it a retrospective effect, so that immediately this judgement would become ineffective and the Constitution could then be amended to make law under article 13(2) to exclude constitutional law, and to take away the power from the Supreme Court to declare constitutional amendments *ultra vires*.

My second suggestion is that a constitutional amendment may be passed giving power to the Parliament to set aside any judgment of any Court by a special majority of 2/3 of the members of the Parliament. (Incidentally I may mention that some such suggestion is under consideration in America also). This remedy may be applied alongwith the one above.

### Long Term Measures

As a long term measure, to avoid this possibility of an important judgment involving the interpretation of important statutory enactments or constitutional "laws", we may consider the possibility of making a rule under article 145 or a law by constitutional amendment to the effect that while a majority of one judge would do to pronounce a judgment at the first instance, a 2/3 majority of the judges may be insisted upon for reversing or revising a previous judgment. If not for statutory law, this may be made applicable to reversals in case of constitutional law.

Another suggestion which is of greater importance to the citizens is that the Supreme Court should be requested to deal with all the points relevant to a particular case or arising either directly or indirectly, and give a final or comprehensive opinion, whether particularly raised or not, or pressed or not by the parties. Leaving a number of points untouched on the above grounds, as I have already said, is opening the flood-gates of litigation and leaving us in suspense as to the correct interpretation of the Constitution. This is not the meaning of "the law declared" in article 141 which should be binding on all of us in this country,<sup>15</sup> nor is it "doing complete justice" under article 142.

A third suggestion which is of greater significance from the common tax-payer's point of view is that every Bill or at least every proposed constitutional amendment may be sent to the Supreme Court for advisory opinion by the President under article 143. This will help the country to a very great extent in time, money and energy, to know what the law is; and if this is coupled with the other suggestion, made above, that the Supreme Court can reverse its opinion in future only with a 2/3 majority, the country can have some stability and peace of mind.

15. See the judgment of the Court in this case on the meaning of "declared".

## *Golaknath's Case: A Lost Opportunity*

•P. PARAMESWARA RAO†

THE QUESTION BEFORE the Supreme Court, in *Golaknath's* case was: whether an amendment to the Constitution is 'law' within the meaning of article 13(2). In 1951 in *Shankari Prasad's*<sup>1</sup> case the Court unanimously answered it in the negative. In 1965 this view was reaffirmed in *Sajjan Singh's* case<sup>2</sup> by a divided Court (5 : 2). In *Golaknath's* case a larger Bench consisting of all the eleven judges has reconsidered the question and by a majority of six to five overruled the earlier decisions.

The six judges who constituted the majority came to the same conclusions but through different process of reasoning. On the question whether article 368 contains the power of amendment, the Chief Justice and four of his associate judges have expressed the view that the power of Parliament to amend the Constitution is derived from articles 245, 246 and 248 and not from article 368, while Mr. Justice Hidayatullah has taken the view that article 368 outlines a process, which if followed strictly, results in the amendment of the Constitution. If it can be called a power at all, according to him, it is a legislative power but is *sui generis* and outside the three Lists in the Schedule Seven of the Constitution. Again regarding the validity of the First, Fourth and Seventeenth Amendments the first five judges held relying on the doctrine of prospective overruling that said amendments would continue to be valid. While the sixth judge Mr. Justice Hidayatullah also held them to be valid, but on the basis of acquiescence. These basic differences in the two approaches have tended to weaken the authority of the decision considerably.

The needless observations made by the majority as to how Part III of the Constitution could be amended in future so as to abridge any of the rights therein if such an abridgement was considered necessary, are 'obiter

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1. 1952 S. C. R. 89

2. 1965 I. S. C. R. 933

*dicta*'. In fact the Chief Justice and four other judges have clearly stated "We do not express our final opinion on this important question".

The language of Article 13(2) and the earlier pronouncements of the Court regarding the doctrine of eclipse<sup>3</sup> and the doctrine of waiver<sup>4</sup> militate against the applicability of the doctrine of prospective over-ruling or the theory of acquiescence. Instead of placing reliance on one or the other of these untenable theories the majority could have corrected the basic errors underlying the Court's interpretation of the right to property and brought about more or less the same result.

Mr. Justice Hidayatullah has pointed out, after a thought-provoking analysis of all the amendments hitherto made, that except the right to property none of the fundamental rights was abridged by the amendments. He also observed that all would have been well if the Court had construed article 31 differently. *Golaknath's* case afforded an opportunity to the Court to revise its interpretation of the right to property, which indeed was mainly responsible for the impugned amendments whittling down the safeguards in respect of the right to the property. Abandoning its earlier attitude and relying on the directive principles, the Court could have re-interpreted the right to property. It would then have been possible for the Court to formally strike down the impugned amendments while in effect preserving their substance.<sup>5</sup> It is indeed regrettable that the Court did not avail of the opportunity unfolded by this case.

The position resulting from *Golaknath's* case is that Parliament has no power under article 368 to abridge or take away any fundamental right. While the interpretation of the right to property and the attitude of the Court to the directive principles remain unchanged, denial of power to Parliament to amend Part III will necessarily lead to great difficulties. Hence the need to find way out of the present impasse. Several suggestions have already been made by responsible public men. Besides, a Bill seeking to assert the power of Parliament to amend the rights in Part III is already before Parliament. However it is advisable to put an end to the unhealthy process of action and reaction that has gone on till now. It is time to consider coolly all the aspects of the matter and then decide upon a constructive approach to the problem.

Viewed against the background of the Universal Declaration of Human Rights, the fundamental rights have an element of sanctity and universality about them which should not be sacrificed in any event. To

3. *Deepchand v. State of U.P.*, A. I. R. 1959 S. C. 648

4. *Bashesharnath v. I. T. O.*, A.I.R. 1959 S.C. 149.

5. For clearer exposition of this view see the article: Proper Approach to Fundamental Rights, *Indian Express*, April 4, 1967.

fling the fundamental rights at the feet of a Parliamentary majority to be trampled upon at its will may not be a wise step. At the same time to allow the judiciary to ignore the directive principles while determining the scope of any of the fundamental rights is also detrimental to the interests of democracy and economic justice—two basic tenets of our Constitution. It is, therefore, necessary to make it clear in the Constitution that a law which gives effect of a directive principle shall not be deemed to take away or abridge any fundamental rights under article 13(2). How to effect this amendment is the question?

In the case of *State of West Bengal v. Union of India*<sup>6</sup> the Supreme Court had accepted the proposition that sovereignty resides in the people of India. Even according to the *obiter dicta* of the majority judges in *Golaknath's* case there can be no objection if Part III is sought to be amended with the consent of the people. There may be differences as to the proper instrument to effect this purpose.

A proviso may be added to article 368 following the procedure prescribed for its amendment, to the effect that a Bill which seeks to amend the Constitution so as to take away or abridge any fundamental right shall, after it has been passed by the two Houses of Parliament with the requisite majority, be submitted to the people entitled to vote for ratification through a referendum and the Constitution shall stand amended in accordance with the terms of the Bill only after the Bill has been ratified by a majority of the people participating in the referendum. Once this is done it will be possible to amend article 13(2) as suggested above so as to facilitate the implementation of the Directive Principles of State Policy without at the same time affecting the sanctity and enduring value of the fundamental rights.

## *The Golak Nath Judgment—Some Legal and Political Implications*

●T. S. RAMA RAO†

BY CONSTRUING A part of the Constitution (the fundamental rights Chapter) as virtually<sup>1</sup> immune from the process of constitutional amendment, in the case of *Golak Nath v. State of Punjab*, the Supreme Court of India has created legal history. The reaction to the judgment has been sharply divided. The decision was given soon after the results of the recent general elections were announced. While one does not know whether this timing was deliberate, it seemed immediately after the judgment that it might well have a chance of remaining undisturbed considering the fact that the Congress party which had ushered in as many as seventeen amendments in the seventeen years that have lapsed after the advent of the Constitution, had lost its overwhelming majority in the Parliament as well as its hegemony in various states and that it might be difficult to secure a new amendment superseding the effect of the above judgment, in the context of the new political conditions and especially of the consolidation of the rightist parties in the elections. However, recent events indicate that Parliament is likely to make a move for superseding the judgment, as a bill for this purpose moved by a Socialist Member has been referred to a Joint Select Committee of Parliament. Evidently, the Leftist opposition parties have joined with the Congress party in its opposition to the judgment, and the all-too familiar spectacle of a clash between the Judiciary and the Legislature, with the latter gaining the upperhand by a constitutional amendment, is once again likely to be re-enacted. The rightist parties, and some independents, Mr. J. B. Kripalani being conspicuous among them, seem to be the only forces in Parliament opposed to this move.

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1. This qualification is added, as Parliament is forbidden only from 'abridging or taking away' the fundamental rights within the meaning of article 13 (2) of the Constitution and not from widening their scope or strengthening them.

The judgment of the Supreme Court can be viewed as symbolic of the attitude of protest, alarm and revulsion felt by responsible sections of legal opinion in this country at the cavalier manner in which the politicians have sought to twist judicial efforts to protect and strengthen the fundamental rights as attempts to bolster up the vested interests and the privileged sections of the people and have sought the aid of socialistic slogans arousing class-passions, to eliminate the restraints of judicial review on their freedom of action. For, it will be remembered that the previous constitutional amendments were intended not at an immediate ushering in of the socialistic panacea, but merely at excluding judicial review of the validity of the acts that might be undertaken in future by the Legislature to achieve that goal. In other words, the objection has been to judicial review as such; and no chance was given to the judiciary at arriving at a workable balance between the rights of the citizen and the interests of the State by the slow but steady process of judicial review extending over a series of cases. Article 31-B with its expanding list of State laws made immune from judicial scrutiny without even a cursory examination of their contents by Parliament, is a classic illustration of this hostile attitude of our politicians to the power of judicial review as such. As Hidayatullah J. has vividly pointed out in the present judgment, 'the intent is to silence the Courts and not to amend the Constitution'. It would be a tragedy indeed if, as seems likely, this attitude persists and the present judgment is superseded by a constitutional amendment without a calm and dispassionate analysis of its long-term implications for the future of democracy and rights of the citizens in this country.

For, contrary to *prima facie* impressions that one may get on reading the ratio of the majority judgment, there is nothing in it to alarm even the most bigoted socialist, in view of the saving of even the 'prospective' operation of article 31-A (which in effect, makes agrarian reform laws immune from attack in Courts on the ground of violation of fundamental rights.)

Five of the majority judges, adopted Subba Rao C.J.'s view upholding the Seventeenth and earlier Amendments to the Constitution under the doctrine of prospective overruling, but barring future amendments to the Constitution 'taking away or abridging' fundamental rights within the meaning of article 13 (2) of the Constitution. One would have concluded from the above doctrine of prospective overruling by the Court that the first seventeen Amendments cannot have future operation and that only acts already passed under these Amendments would be valid. Subba Rao C.J. specifically overruled the objections to the doctrine of prospective overruling, especially the major objection that "it would not encourage parties to prefer appeals as they would not get any benefit therefrom" (italics mine),

judge was influenced by the views he had earlier expressed about property right being the 'weakest' of the fundamental rights and by his opinion that it was an 'error' to have placed this right (in Part III, in arriving at this surprising conclusion. Anyhow, on the issue of the validity of article 31A, all the majority judges thus agreed with the minority view (the minority judges had held that all the amendments are valid), which thus prevailed on this point. This is indeed symptomatic of the co-operative attitude which the Court had always adopted on the issue of agrarian reforms, though such an attitude had not induced the politicians from viewing judicial review in the field of property rights with indulgence.

The present judgment thus permits agrarian reform in all its plenitude. As for the other fundamental rights, since preventive detention is already "enshrined" as one in article 22, the only substantial rights left for the citizen are the rights of equality, the freedoms under article 19, freedom of religion under articles 25 to 27, and the rights under article 20 (giving protection in respect of conviction for offences)—all of which are subscribed to with gusto by all the political parties in India. Hence, there seems no case for an immediate reversal of the Supreme Court's judgment at all.<sup>3</sup> However, the approach of the politicians seems to be emotional, as they view the question in terms of a conflict between their freedom of action under the guise of parliamentary sovereignty, and the 'undemocratic' right of eleven judges to set aside parliamentary laws. This leads us to consider in perspective the political implications of the judgment. Before we do so, we may briefly touch upon some other legal aspects of the judgment.

One important feature of it is that judges have freely referred to the debates in the Constituent Assembly, to buttress their conclusions, though Subba Rao C.J., has cautiously added that he referred to the speeches of Pandit Nehru and Ambedkar 'not with a view to interpret the provisions of article 368, which we propose to do on its own terms, but only to notice the transcendental character given to the fundamental rights by two of the important architects of the Constitution'. However, by such reference, they have significantly deviated from the English norms of interpretation till now adopted by the Court, under which debates can be referred to only in case of latent ambiguity in the text of the statute construed by the Court, and have come closer to the American approach favouring free reference to legislative and constitutional debates.

3. The *Golak Nath* judgment, of course, leaves intact the constitutional safeguards to the citizen in cases of urban acquisition. However, in the long run, these are not likely to prove of real hindrance to genuine reform measures that may be adopted by the Government, notwithstanding the decisions in *Vajravelu* and *Metal Corporation* cases (A.I.R. 1965 S.C. 1017 and A.I.R. 1965 S.C. 637), in view of the cooperative approach of the Court towards such reform measures.



However, it is submitted that Subba Rao C.J.'s conclusions from the speeches of Nehru and Ambedkar that they subscribed to the theory of the unamendability of the fundamental rights seems, with respect, to be far-fetched. Dr. Ambedkar's view that 'if the future Parliament wishes to amend any particular article *which is not mentioned in Part III or article 304*, all that is necessary for them is to have two-thirds majority', (*italics mine*), seems to have been based on the erroneous notion that he seems to have had at that time to the effect that amendments of these articles in Part III, require ratification by the State Legislatures, as has been convincingly pointed out by Bachawat J. Nehru's reference to 'the permanent' nature of fundamental rights, also seems to have been only a figure of speech to emphasise the spirit behind these rights, as he had later warned against the Supreme Court becoming a third Chamber of the Legislature, following the American Supreme Court and had also threatened packing of the Court to prevent such a result. In fact, it is doubtful if the members of the Constituent Assembly realised the full implications of judicial review. Even lawyer-members, like Sir Alladi Krishnaswami Iyyar, imagined that in interpreting the provisions of Part III, e.g., the word 'compensation' therein, the Supreme Court will follow the canons of interpretation adopted by the Judicial Committee of the Privy Council, and will supersede Parliament's interpretation only when there is a colourable exercise of power on its part or it has committed a fraud on the Constitution. Due to their unfamiliarity with American case law, they seem to have assumed that the Court's interference with the decisions of Parliament will occur only in exceptional and extreme cases of abuse of power, or such fraud on the Constitution. Besides though the rightists led by Sardar Patel were predominantly strong in the Constituent Assembly, they too seem to have relied more on their own ability to prevent socialistic interferences with property rights in the legislatures, than on the efficacy of the unfamiliar instrument of judicial review.<sup>4</sup> Hence it is more likely that the members of the Assembly, leftists as well as rightists, had the image of the Bill of Rights under the preamble of the French Constitution, rather than the American pattern of due process and of heavy reliance on judicial law-making, when they enacted the fundamental rights Chapter.<sup>5</sup> It is also

4. For a further study of the views of the framers of the Constitution, see T. S. Rama Rao, (i) 'Property Rights—Attitude of the Framers of the Constitution', *Lawyer* (Madras), November 1960, p. 16; (ii) 'Problem of Compensation and Its Justifiability in Indian Law' *Journal of the Indian Law Institute*, 1962, Part 4, p. 481; and (iii) 'Resources, Distribution and Property Rights', paper read at the Seminar on "Constitutional Law, Recent Trends", held in October 1966 at the University of Bombay.

5. It is interesting to find in this connection that Shri J. B. Kripalani, the Chairman of the Fundamental Rights Committee in the Constituent Assembly tried to

famous American case *Marbury v. Madison*,<sup>6</sup> where Marshall C.J., enunciated the doctrine of judicial review on the basis of first principles and axioms of law, whose validity has to be examined on the touchstone of one's conscience and not on Thalmudian principles of statutory construction.

For, viewed purely on the plane of textual construction, the dissenting judgment, especially that of Wanchoo J., seems to be more persuasive than the majority judgments. The concept of unamendability of fundamental rights, based on what seems to be a misinterpretation of the views of Nehru and Ambedkar as noted above, is made to rest in the majority judgments on an artificial construction of article 368 as providing merely for the procedure of amendment, the substantial power to amend resting in article 245, and the residuary power (article 248). The arguments enunciated by Wanchoo J. for construing article 368 as providing the substantive power of amendment also are compelling and persuasive. Besides, the majority judges are compelled to read articles 245 and 248 together with article 368, for the purpose of getting over the effect of the limiting words "subject to the provisions of the Constitution" found in the first article, and spelling out the power of amendment from the two articles. When such is the case, article 13 itself could well have been read with article 368 to exclude constitutional amendments from the purview of 'law' mentioned in article 13 (2). And if such amendments were 'law' under article 13, the amendment laws would be still-born under the ratio in *Deepchand's case*<sup>7</sup>, as pointed out by Wanchoo J. By enunciating the doctrine of prospective overruling, the majority judges must be deemed to have impliedly overruled *Deepchand's case*. And the *reductio ad absurdum* attempted by the majority judges by the argument that nullification of fundamental rights which cannot be effected by a unanimously passed parliamentary law, can be done by a two thirds majority by a mere change of title of the law, as a Constitution Amendment Act, is answered by the *reductio ad absurdum* implicit in the suggestion of the majority for convocation by Parliament of a new Constituent Assembly to amend fundamental rights; for, such an Assembly can amend the rights by a bare majority.

The majority judgments could perhaps have been less vulnerable to such legalistic attacks, if they had relied on the doctrine of implied limitations of the amending power. The argument that there is no scope for application of such doctrines in view of the length and the exhaustive character of the Constitution may be rebutted by pointing

6. 1 Cr. 137 (1803) ; 2 L. ed. 60.

7. 1959 Supp. 11, S.C.R.8.

out that in a sense such a doctrine is assimilable to a rule of interpretation of the Constitution.

We may now examine briefly the political implications of the judgment. As noted above, while the majority judgment could well be accepted by Parliament and the Government, especially in view of the continued efficacy of article 31-A of the Constitution, the trend seems to be in favour of the passing of another constitutional amendment to supersede the effect of the Court's judgment preferably by amending article 368. As noted above, the reaction of the politicians, seems to be mainly an emotional one. Political scientists have commented on the authoritarian tradition of the country and of the fact that the Constitution of India, which is an essentially imported product has been "effectively modified by a non-Western political process and by a social and political tradition which has been shown to be essentially authoritarian"<sup>8</sup>. One can only conclude that the impatience of the powers that be at any undue assertion of judicial powers of review by the Courts is an offshoot of this undemocratic and intolerant tradition. This habit of offsetting judicial decisions by repeated constitutional amendments constitutes a threat to the future of democracy and the liberties of the citizens, which the intelligentsia of the country should do their best to counteract. As Hidayatullah, J. has pointed out, "The erosion of the right to property may be practised against other fundamental rights... Small inroads lead to larger inroads and become as habitual as before our freedom was won."

*Apropos* this remark of the learned judge, we may note that the property right in spite of the opprobrium in which it seems to be held by most of the politicians in this country, is historically found to be the basis of other rights. It is the middle class of England which successfully asserted its rights against arbitrary executive actions, as typified by the statement about the Englishman's home being his castle. The 'homeless' are evidently not strong enough to assert their rights and liberties, which can be effectively insisted upon only by a class of persons with independent stakes and not dependent for their very livelihood upon Authority. Besides, the history of communist countries shows that in the atmosphere of class hatred that is nurtured there, the Government invariably condemns the dissenters as enemies of the State; civil liberties can hardly develop in such an environment even under 'revisionist' regimes, as is shown by the continued detention of Djilas in Yugoslavia<sup>9</sup>. There is a possibility of India with its authoritative tradition sliding into such totalitarianism if the sacredness of fundamental rights and the status of

8. See S.P. Aiyar, 'Constitutionalism in India' in S.P. Aiyar and R. Srinivasan (Eds.): *Studies in Indian Democracy*, p 695.

9. Djilas has since been released, *Ed.*

the judiciary as the supreme sentinel and guardian of these rights are tampered with.

There is, however, another side of the agrarian picture to which attention may be drawn here. Political scientists have drawn attention to the operation of different political idioms prevalent in the Indian society, the traditional idiom spoken in rural India, with caste as the core of its politics and the modern political idiom used by the urban elite, and the leadership at the Centre.<sup>10</sup> There is a curious phenomenon found in India, of the State leaderships and Governments being obliged to pay mere lip service to the socialistic and other directives given by the Central leadership, but being obliged to subvert them at the stage of implementation due to the pressure of rural groups. The Nagpur Resolution and much of the blueprint for land reforms enunciated at the halls of the Planning Commission and the Secretariat in Delhi, have been quietly either relegated to the limbo, or diluted considerably, by the State Governments and legislatures in enacting the implementing laws. This explains the loopholes deliberately provided in the ceiling and other land reform laws, and the anxiety of several State Governments to abolish land revenue and thereby gain the rural votes. The landed gentry in rural India seem to be strongly entrenched indeed in spite of all the reform laws, which seem to affect only the inarticulate caste, communal and other minorities and not the dominant castes whose votes count. These people, in fact, manage to circumvent even the moderate laws that have been enacted by the Legislatures. Thus the Fair Rent and Tenants' Protection Acts seem to be a mere dead letter in most of the rural areas. This divergence between law in the statute book and law in practice is indeed a subject crying for research in India. This phenomenon, together with that of the tacit disobedience to most of the reform-laws (extending from prohibition and anti-dowry laws at one end to land-reform laws at the other); would if allowed to persist, only serve to bring the legal process and the rule of law itself to contempt in the country.

Another factor that may be noticed is the excessive attachment to land in India, extending even to leftist leaders and the crucial role of caste in all political parties. The phenomenon of Khamma landlords dominating the Communist party in Andhra has been studied by political scientists. Recently, Mr. S. N. Dwivedy drew attention to the fact that many of the leaders of the Naxalbari rebels were themselves jotedars owning lands in excess of the ceiling limit.<sup>11</sup> The impact of this mosaic of

10. See W.H.Morris Jones, 'India's Political Idioms', in Phillips (Ed) *Politics and Society in India*, p. 133, C.R.M. Rao, 'The Levels of Indian Politics', S.P. Aiyar and R.Srinivasan (Ed), *Studies in Indian Democracy*, p. 123.

11. S. N. Dwivedi, 'Motivation for Naxalbari', *The Hindu*, July 27, 1967.

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## *Golaknath's Case: A Critique*

•G. C. VENKATA SUBBARAO†

THE DECISION OF the Supreme Court in *Golaknath's* case covers a vital area of the Constitution and so it is proposed to canvass the logic underlying it at some length. The question is whether in article 13 of the Constitution "Law" includes a constitutional amendment. Article 13 provides that the State cannot make a law which takes away or abridges the rights conferred by Part III. The Constitution I, IV and 17th Amendments obviously abridge fundamental rights conferred by Part III and so the question is whether these amendments are hit by article 13. The contentions urged in behalf of the validity of the amendments will be considered seriatim.

### **Contention I.**

The first contention is that a constitutional amendment is produced by the exercise of constituent power while a law is produced by the exercise of legislative power. So a constitutional amendment is not covered by the expression "law".

This contention cannot stand close scrutiny. Constituent power is also a legislative power so long as it is exercisable by one particular Legislature. Where the Constitution is flexible and there is no difference in legislative procedure between a constitutional amendment and the enactment of law, constituent power is indistinguishable from legislative power. This is the position, for instance, in England, when the Constitution is rigid, the procedure for constitutional amendment no doubt diverges from the procedure for the ordinary law-making, but how can this divergence affect the nature of the end product? If constituent power is exercised, constitutional law emerges. If legislative power is exercised, private law, such as personal law, contract law, property law etc. emerges. But what emerges in either case is "Law".

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peculiarities on the Indian political scene seems to be that, contrary to Hidayatullah J.'s statement, property rights far from being the 'weakest', seem to be strongly entrenched in rural India, pace all the constitutional amendments and the failure of the Supreme Court to protect these rights. *Perhaps if the political leaders had adopted the 'reactionary' method of banning absentee-landlordism, fixing low ceilings after allowing the landlords to sell away their surplus within a fixed period, and authorising the State acquiring them at the full market value prevalent at the end of the period (which would evidently have come down), perhaps land reforms in India might have been a success as in Japan or Taiwan, which only goes to show that constitutionalism and fundamental rights are the best guarantees of securing peaceful and effective social change.*

# *Golaknath's Case: A Critique*

•G. C. VENKATA SUBBARAO†

THE DECISION OF the Supreme Court in *Golaknath's* case covers a vital area of the Constitution and so it is proposed to canvass the logic underlying it at some length. The question is whether in article 13 of the Constitution "Law" includes a constitutional amendment. Article 13 provides that the State cannot make a law which takes away or abridges the rights conferred by Part III. The Constitution I, IV and 17th Amendments obviously abridge fundamental rights conferred by Part III and so the question is whether these amendments are hit by article 13. The contentions urged in behalf of the validity of the amendments will be considered seriatim.

## **Contention 1.**

The first contention is that a constitutional amendment is produced by the exercise of constituent power while a law is produced by the exercise of legislative power. So a constitutional amendment is not covered by the expression "law".

This contention cannot stand close scrutiny. Constituent power is also a legislative power so long as it is exercisable by one particular Legislature. Where the Constitution is flexible and there is no difference in legislative procedure between a constitutional amendment and the enactment of law, constituent power is indistinguishable from legislative power. This is the position, for instance, in England, when the Constitution is rigid, the procedure for constitutional amendment no doubt diverges from the procedure for the ordinary law-making, but how can this divergence affect the nature of the end product? If constituent power is exercised, constitutional law emerges. If legislative power is exercised, private law, such as personal law, contract law, property law etc. emerges. But what emerges in either case is "Law".

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The majority judgment in *Golaknath's* case contains observations to the effect that article 368 sets forth only the procedure for amending the Constitution and the constituent power is to be traced to the Residual Power, if there is no other provision relatable to it in the articles dealing with the distribution of legislative powers. This observation is intended only to emphasise that inherently there is no distinction between "Legislative Powers" and "Constituent Powers". Suppose article 368 was not incorporated in the Constitution and there is no other specific provision relating to constitutional amendment, then can it be disputed that constitutional power would fall to be considered under Residuary Powers? A special provision (article 368) had to be made because in a federal Constitution such as that of India, constituent power cannot be allocated either to the Centre or to the States. A body in which both Centre and the States participate is to be created for exercising the constituent power in a federal State. In Canada the Centre and the Provinces have tried from time to time most earnestly to agree upon such a body for constitutional amendment but till today the problem has proved intractable and has defied solution. In Switzerland and Australia the problem is solved by means of a constitutional referendum. In such a case no doubt that the constituent power is not a legislative power for the simple reason that it is not entrusted to the legislature. In America a satisfactory solution was found by the founding fathers. In India article 368 answers the purpose quite well. In *Shankari Prasad's* case the Supreme Court had said that article 368 gives the constituent power to Parliament although a special majority (2/3 majority) is needed for a constitutional amendment, generally, and in the case of the entrenched Provisions of the Constitution referred to in the proviso to an article 368, one-half the States also have to pass ratifying resolutions. In *Golaknath's* case the majority judgment delivered by the learned Chief Justice practically reached the same conclusion though the constituent power is traced to the residual power rather than to article 368 itself. Patanjali Sastri's reasoning on this point seems to be sound. It is from the provisions contained in article 368 itself that he has concluded that Parliament has been endowed with the constituent powers. The 'Residual Power' has been allocated by article 248 of our Constitution to Parliament and so it is immaterial for practical purposes whether the source of Parliament's constituent power is article 368 or 248. But suppose for a moment that the 'Residual Power' had been given to the States by the Constitution, then would there not be a serious conflict between article 368, whose procedural machinery is designed to be operated by Parliament, and the constituent power passing to the States under the residue without control over the procedural machinery of article 368, which alone can make that power effective? The reasoning of *Shankari Prasad's* case on this point is thus logically preferable to that in *Golaknath's* case. But as already mentioned, since the Constitution has

conferred residual power also upon Parliament the ultimate conclusion in both cases pointing to Parliament as the wielder of constituent power is perfectly correct. That, however, does not by itself solve the question posed for solution in the two cases. This constituent power also gives rise only to "law", *albeit* constitutional law, and would, therefore, be subject to article 13 which inhibits laws infringing fundamental rights. No doubt in the Constituent Assembly, Sri H. V. Kamath with great foresight moved an amendment to article 13 which would have added an explanation to that article making it clear that "In this Article 'Law' shall not include a constitutional amendment" but this amendment was thrown out by the Constituent Assembly. So we have to deal with "law" unaided by such an explanation. A distinction between constituent power and legislative power 'no doubt' exists in rigid constitutions but it is impossible to suggest that the resultant product of parliamentary action, whichever of these powers is exercised, is not law. The utmost that can be said is that constituent power gives rise to 'constitutional law' while legislative power gives rise to some other kind of law depending upon the particular legislative topic dealt with by the Act in question. So we proceed to the second contention.

### Contention 2.

"Law" in article 13 does not include Constitutional law, *i. e.*, a constitutional amendment. This is a narrower contention than the first, since it does not relate to law generally but to law in the specific context of article 13. The general rule of grammatical construction includes in the category of law every species of that description and so if this rule of construction is followed, constitutional law can never be excluded from the scope of "law" in article 13. It was here that in *Shankari Prasad's* case, Patanjali Sastri, Chief Justice, jettisoned the golden rule of grammatical interpretation and embraced the rule of "logical interpretation" which permits of a departure from the ordinary connotation of a word in preference to a far-fetched meaning thereof. The far-fetched meaning may either be wider than the ordinary meaning or narrower. If the wider meaning is accepted it would be "restrictive" interpretation. Patanjali Sastri, C. J., followed logical interpretation of the restrictive variety and concluded that the word "law" in the context of article 13 does not include constitutional law. To follow the rule of logical interpretation in supersession of the normal rule of grammatical interpretation justification must be shown. Jurists are agreed that logical interpretation can be resorted to only when there is "ambiguity", incompleteness or "repugnancy" in the *littera legis*. Patanjali Sastri, C. J. pointed out that there was "repugnancy" and so he could resort to logical interpretation. Where then is this "repugnancy"?

Patanjali Sastri, C. J., posited a repugnancy in this way. Article 368 does not exempt Part III of the Constitution from the reach of this amending process. But article 13 exempts it if we follow the rule of grammatical interpretation. So there would be repugnancy. Therefore, logical interpretation must come to our rescue. The fallacy in this reasoning has now been exposed by the Supreme Court in *Golaknath's* case. Article 13 does not exempt Part III from the reach of the amending process. Even Part III may be amended by pursuing the procedure prescribed in article 368. All that article 13 says is that no law may be made which "takes away or abridges the rights conferred by Part III". Why should it be supposed that an amendment to Part III must necessarily abridge or take away fundamental rights? Amendments may also add to or enlarge the fundamental rights. They are not hit by article 13. So the repugnancy imagined by Patanjali Sastri, C. J., is non-existent. Consequently the resort to logical interpretation in *Shankari Prasad's* case is illegitimate.

### Contention 3.

When the specific ground of "repugnancy" referred to by Patanjali Sastri, C. J., was found to be untenable, another ground of repugnancy was suggested by learned counsel arguing the case. Article 368 permits of any kind of constitutional amendment. Article 13 permits only such amendments as would add to or enlarge fundamental rights. Repugnancy thus exists rendering resort to logical construction necessary. In referring this argument, Subba Rao, C. J., pointed out that article 368 deals only with the procedure for amendment and does not itself confer a power of amendment as such and much less a power of amendment unlimited. While dealing with contention 1, we have said sufficient to indicate that it is not necessary to differentiate between the substantive power of amendment and its procedural aspect. When the procedure is followed, the right itself is exercised. So the constituent power need not be traced to any source beyond article 368. But the learned C.J. is perfectly right in pointing out that this power need not be an unlimited power. The limits to this power may be indicated elsewhere in the Constitution. One such limit is found in article 13. So it is not possible to postulate a repugnancy between article 13 and article 368.

The attempt of learned counsel was to equate constituent power with sovereign power and then urge that sovereign power is ex-necessitate unlimited. The theory of unlimited sovereign power associated with the famous names of Bodin, Hobbes and Austin has now been banished from the realm of politics. Its fallacies were exposed by jurists like Harold J. Laski, Salmond and Bryce. It is now

taken for granted that the constitution may impose limits upon the sovereign legislature. "Sovereignty within limits" is now the staple concept of political science. The fallacy in equating sovereignty with unlimited power of Parliament lay in confusing between limitation upon power with subordination of power. A legislature is sovereign so long as it is not subordinate in its sphere although that sphere itself may have been precisely demarcated by the constitution and is not unlimited in extent. Indeed such limitation upon sovereign power is the very foundation upon which a federal polity securely reposes. In the United States no amendment to the constitution can be made which denies to a State against its will a right to equality of representation on the Senate. Then what becomes of the unlimited character of the constituent power? So the learned Chief Justice is obviously right in holding that the constituent power is not *ex-necessitate* unlimited in range.

While, therefore, the observations of the learned Chief Justice suggesting that the source of the constituent power is to be sought elsewhere than in article 368 are to be treated as *obiter*, his conclusion that the constituent power is not necessarily an unlimited power is beyond cavil. So article 13 cannot be regarded as being repugnant to article 368 simply because it has imposed a limitation upon the amending power.

The reasoning of the majority view in *Golaknath's* case has thus come to close grips with the reasoning in *Shankari Prasad's* case and has demonstrated the unsoundness of the latter. In view of this conclusion the Constitution 1st, 4th and 17th Amendments could have been struck down. But here the Supreme Court has displayed judicial statesmanship of a high order by propounding the doctrine of "Prospective over-ruling". The overthrow of the amendments in question would have upset agrarian reforms already implemented and conjured into existence stupendous problems, with which it would be difficult for the legislature to grapple. So while indicating the correct interpretation of article 13 the Supreme Court has intimated that any abridgement of Part III rights would be invalidated hereafter even if such abridgement is occasioned by constitutional amendments in the future. Over the past amendments a veil of oblivion has been drawn and their operativeness would not be questioned notwithstanding their unconstitutionality. It must be admitted that this is judicial legislation but it is justifiable on pragmatic grounds. The Blackstonian doctrine of *jus dicere et jus non dare* (Judges only declare the law but do not make it) was described as a childish fiction by his able disciple Jeremy Bentham.

The doctrine was repudiated by Austin and finds no place in American realist Jurisprudence. No doubt judges continue to pay

*nominal homage to this doctrine themselves but the current trends are dispensing even with lip service to this motive. So there is nothing in our constitutional law precluding the application of the doctrine of retrospective over-ruling. This undoubtedly involves judicial legislation but it is judicial legislation inspired by judicial statesmanship of a rare vintage.*

## *Social Philosophy Versus Fundamental Rights*

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THE WHOLE QUESTION arising out of the judgment of the Supreme Court in the *Golak Nath v. the State of Punjab* is whether the Parliament is competent to amend fundamental rights in view of the prohibition in article 13 (2) and the permission in article 368 to do so. It is precisely a legal albeit a constitutional issue which could have been finally settled but for the precariously divided opinion of the Court itself. In fact, prior to this judgment it was taken for granted that in the light of the First Amendment, the Fourth Amendment and the Seventeenth Amendment, which remained unchallenged by the Supreme Court, the authority of the Parliament to undo the effects of judicial decisions was indisputable. In the present case, the majority of judges turned the apple-cart on the Parliament by contending *de novo* that Part III of the Constitution is outside the power of the Parliament to amend. It has taken the view that a gradual erosion of fundamental rights is involved in the amendments to article 31.

Lest we stray into pointless argument, it would be profitable to look straight into the problem not from a strictly legal angle but in the wider context of the social philosophy that guided constitution-making *ab initio*, and its development during the past two decades or so. In this paper I propose to examine the crucial issue of the balance of liberty and social good as relevant to our concept of democracy that has less by accident and more by design been given a fillip in this country by those who mattered.

It may be recalled that the Constituent Assembly's treatment of the 'due process' clause as it affected liberty and property gave the most authentic insight into the members' disposition to the primacy or other-

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wise of liberty and social transformation. The classic dilemma of how to preserve individual's freedom while at the same time advancing public good seemed to resolve itself. The dominant thinking veered around a theory that sought to compromise the two apparently conflicting ideologies of individualism and socialism. In the ultimate count the balance was made to tilt in favour of the principle of social good assuming that beyond a point the compromise would not stand to test. At least, this was so in relation to article 31, if not for others.

That such a philosophy was essential to a developing society was the point of view sponsored by the leading architects of the Constitution. The Constitution to them was the instrument of social change and not merely a mechanism for political administration. Hence, the utility of the Constitution or any part thereof could be judged by its subservience to this vital end. There was no 'sanctity' of the Constitution beyond this.

Such an idea, whether we like it or not, found expression in most of the utterances during debates on Part III, Part IV, the Preamble and several other provisions besides the discussions over the aforesaid amendments in and out of the Parliament. There is, indeed, a basic philosophy that prerequires our understanding of the slant of 'common good', 'general welfare', 'social interest' given to the prevailing outlook on the subject of Man versus the State. It looked as if T. H. Green was triumphant over Herbert Spencer in the matter of prescribing State obligations towards the citizens.

Not that the judiciary in a liberal State should be dictated by the dominant philosophy of the Constitution: it can have a philosophy of its own for the protection of fundamental rights that have been left to its care. But the question we need ask ourselves is whether in terms of the Constitution is it not implied that in case of a conflict between the judiciary and the Parliament the latter has the final say? Since this involves a big question in itself, we need to bring evidence to bear on it.

The fundamental rights of the Constitution are, in general, those *negative obligations* of the State that prevent the encroachments on individual freedom and have been inspired by the U. S. Bill of Rights. But the State, in addition to obeying these negative injunctions must also act *positively* to protect those very rights from encroachment by society. The fundamental rights are, therefore, vested with a dual function; to protect freedom and to provide social change towards an egalitarian social set up where citizens are not only free from State coercion but also from social exploitation of one form or another. The restrictions imposed on

'Fundamental Rights' and the 'Directive Principles of State Policy' are meant to achieve such a goal. The fundamental rights are fundamental not only because they are justiciable but because they are the basic conditions of civilized life; directive principles, though not justiciable, enjoy the sanction of public opinion and are fundamental to the governance of the country. So that we are face to face with two fundamentals of the Constitution and it is the responsibility of the Government i.e., the Parliament, the Cabinet and the Courts, to find continually a middle way between individual liberty and public good in the context of the changing times and situations. That is what will give dynamism to the Constitution.

While Part III predominantly protects or sustains 'the individual', Part IV guards and advances the interests of 'the common man'. In most cases, however, the identities of 'the individual' and 'the common man' merge and their interests coincide. It is only when 'the individual' belongs to the *class* and 'the common man' belongs to the *mass* that a clash of interest in regard to property may arise. And it is in such cases that demands for social justice ensue and the need for public policy is felt. The content of public policy has to be a consideration of general welfare. In this sense the desire for civil rights may not necessarily conflict with that for social justice. For instance, the articles dealing with fundamental rights in each particular case are saddled with restrictions. That is to say, they are self-limiting rights and, therefore, significantly imply a dissolution of the distinction between their positive and negative implications. So that the whole corpus of fundamental rights itself, not to say of their association with directive principles, are tied to a single philosophy which postulates a correspondence or a dialogue between individualism and social control. That social aspect is the over-riding consideration is unexceptionable. Like Sir Issiah Berlin's *Two Concepts of Liberty*, the fundamental rights and directive principles are the two sides of the same coin. Democracy, in fact, bases itself on this twin assumptions.

A wrong question is sometimes put as to which of the two—civil or economic liberty—is basic or prior to the theory of democracy. Actually, the two stand, as it were, on the same horizontal plane, and go together. In common parlance, nevertheless, political freedom or civil rights are thought to precede economic freedom. This, at any rate, was the mind behind Mr. Jawaharlal Nehru's Objectives Resolution, the well-known Motilal Nehru Report, the Karachi Resolution of the Congress on Fundamental Rights and Economic and Social Change. The cumulative thought over the years had a marked impact on the makers of the



Constitution who in turn were convinced of the impossibility of a compartmentalization of rights and principles or policy of social reform. It was in such an intellectual climate of the coexistence of the two concepts that the Constitution took shape.

One need not recall the story of the proceedings of the Constituent Assembly but for the fact of it being the clue to several constitutional issues. There were extraneous circumstances also during the forties like the resurgence of interest in human rights as expressed in the Atlantic Charter, the U. N. Charter, the document produced by the Human Rights Commission. The reaction against the denial of liberty in Germany, Italy and elsewhere could be seen in the sensitiveness with which the Constituent Assembly expressed its own faith in guaranteed rights. The inclusion of fundamental rights being a foregone conclusion, the impetus for the incorporation of directive principles came from the revolution in ideas as exemplified in the works of T. H. Green, the Webbs and Harold Laski amongst others. There were Indian counterparts of these thinkers, persons like Swami Vivekanand, R. C. Dutt and M. Visweshwara. The stress on positive rights as reflected in Part IV emanated from the 20th Century doctrines of social consciousness.

The compulsions of economic degradation of Indian society made Indian leaders unequivocally accept the socialistic view that political liberty is unreal unless it is accompanied by economic equality. And also that economic security is a condition for political stability and freedom. They might not have agreed to the Marxist teachings, liberals as most of them were, they would have been prepared to accept a formula of Welfare State for solving the primary economic problem of the community.

Fed by theory and actuated by facts, the leading members of the Constituent Assembly believed in a State which promotes common welfare. The Constitution established these obligations without doubt. This was the purpose of providing fundamental rights and directive principles as coordinate things for bringing about such a State where freedom was commensurate with the Parliament's right to determine the status of property with a view to end economic disparity among the people. The fundamental rights, while protecting individual freedom, allowed the state to intervene in the interest of social or economic emancipation. Anti-social practices like *Purdah* or *Sati* could be curbed despite religious freedom. Special or unequal treatment could be given to women, children or other backward classes, the right to equality notwithstanding. The minority interests could be preserved within the framework of democracy. And so on. The directive principles provided a further extension to the positive approach to social problems.

It is interesting to note that one of the most important of positive liberties, the right to vote, has been provided not in Part III or IV but elsewhere in article 326. By no means can this right be not treated as fundamental and it can be questioned in the present context whether it is not subject to amendment. If not, the question will crop up: Are there two types of fundamentals, one, liable to amendment, another, not liable to amendment?

There can be no doubt that the fundamental rights as conceived are not absolute. Even the U.S. Constitution has narrowed down the scope of civil rights by the judgments of the Supreme Court. Other constitutions, including Indian, have limited civil rights by provisos to that effect. Different facets of 'public interest' embodied the limits in the Indian Constitution. Instead of leaving it to the courts to read the necessary bindings on rights, it seeks to express elaborately the limitations and exceptions. Moreover, under certain circumstances, the fundamental rights can be suspended. This detracts, in an important way, from their fundamental character for, unlike this, in U.K. and U.S.A. the rights cannot be suspended under any circumstances. The purpose of the emergency provisos, as Dr. Ambedkar clearly declared, "was to prevent endless litigation and the Supreme Court having to rescue the Parliament". The proviso permits the State "directly to impose restrictions on Fundamental Rights".

In defence of the directive principles B.N. Rau maintained that it may be occasionally necessary for the State to invade private rights in the discharge of one of its fundamental duties, *e.g.*, to raise the nation's standard of health, of living etc. He feared that the justiciability of the fundamental rights was likely to override the public weal. He even suggested on careful study that the Constitution may expressly provide that no law or act of the State in the discharge of its responsibilities under directive principles shall be invalid merely for its contravening fundamental rights. Eventually it was thought directive principles should be kept general so that there is room for Parliament to find ways to reach the goal of economic democracy. There remained a feeling, nonetheless, that directive principles fell far short of the socialist ideal. That was that.

Within the framework of the guidelines, it can be argued that the judgment of K. Subba Rao, C. J. and others departs radically from the recognized and accepted norms of judicial competence. It may be pointed out in regard to what has been hinted elsewhere that the Constituent Assembly's approach to the due process demonstrates how they attempted to resolve the conflict between the principle of abstract justice as given in the Preamble and the pressing problem of poverty

with a view to advance the common good which democracy implies. The issue was inextricably connected to the question of expropriation of property and the compensation for it. It was recognized that a system of due process if adopted, would curb legislative power and it would also endanger property, tenancy and other legislation for agrarian reform because then, much would turn on the ideas and interpretation of judges. K. M. Panikkar went to the extent of demanding (the demand has been revived by A. B. Vajpayee and Madhu Limaye recently) that property rights should be kept separately from other fundamental rights; perhaps implying that right to property is not fundamental in the sense other rights are fundamental. Property must be subject to legislation, he maintained. If his suggestion would have been acceptable, the present situation created by the Supreme Court might not have arisen.

B. N. Rau went even further. He advised that the due process clause should be done away with altogether, for, otherwise, there would be severe limitation on the Parliament's power. He warned: "The Courts, manned by an irremovable Judiciary not so sensitive to public needs in the social or economic sphere as the representatives of a periodically elected legislature, will, in effect, have a veto on legislation exercisable at any time and at the instance of any litigant." Presently this has come to pass, although we do not have the due process clause in the Constitution. One can imagine the fears of B. N. Rau being compounded had there been a due process clause. The Supreme Court has not only opened the gates for litigation over tenancy and property rights, it stands in the way of beneficent social legislation. Had our Constitution been more clear like the Irish Constitution on social justice versus property, the course of social progress would not have been hampered by the judiciary.

There are definite indications that the intention of the Constituent Assembly was to restrict the power of the courts to review property legislation. The removal of the protection of the due process from private property meant a gain to the legislature *vis-a-vis* the judiciary. Legislation for land reform was on the anvil of several Provincial Legislatures with popular sentiment in favour of abolition of Zamindari by paying compensation. This raised the question among jurists as to the extent of the State power to deprive a person of his property in the name of social justice? Leaders of public opinion, especially the Congressmen who were committed to abolish Zamindari thought fit to keep compensation out of the courts and to be determined by law. If that was to be done it may be pertinently asked why was the right to property kept in Part III of the Constitution?

It should be profitable to note that the amendment to the Draft Constitution in regard to property moved by Nehru and others provided

that no one would be deprived of his property except by law should also provide for the compensation or the formula for determining it. As a safeguard Presidential assent to such a law was to be obligatory. The import of this motion was to make the Parliament the sole judge of the propriety of the principles to acquire property and the objects to be achieved therefrom. Conversely, it was made clear that the courts will not question the fairness or otherwise of the Parliament's decision. But K. M. Munshi, who was one of the co-sponsors of the amendment left the door from the backside open for the judiciary to enter when he pronounced that the Courts can question it if "the inadequacy is so gross as to be tantamount to a fraud on Fundamental Rights to own property". Nehru was bold to proclaim, "No Supreme Court and no Judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community." The principle of parliamentary supremacy was being established. No individual could override ultimately the rights of the community at large, it was maintained. The Constituent Assembly adopted it as article 31 of the Constitution and Ayyar hailed it as "an instrument of social progress".

Curiously, soon after the Constitution came to function, in spite of all the elucidations to the contrary, the article came into dispute warranting the First Amendment for undoing the Court's objections. The Act of 1951 abolished Zamindari and added articles 31A and 31B to the Constitution. Article 31A overruled the inconsistency with articles 14, 19 and 31 by permitting the state to legislate for the acquisition of estates for public purposes. Article 31B protected various reform acts listed in the Ninth Schedule added to the Constitution alongwith. No reform Act could now be declared void on account of its violating fundamental rights.

The Fourth Amendment in 1955 too modified article 31(2) to the effect that no law passed under the article could "be called in question in any court on the ground that the compensation provided by that law was not adequate". This change was necessitated because in *Bela Banerjee's* case the Court had ruled that the compensation should be the full equivalent of the property. Similarly, by adding Clause 2A to the article the State was empowered to compulsorily acquire property in case of mismanagement detrimental to public interest. The Supreme Court in the second *Sholapur Mills'* case had taken the view that the mill-owners had been deprived of their property and were entitled to compensation. Clause 2A removed this difficulty.

Nehru, prefacing the amendment, reiterated that the "responsibility for the economic and social welfare policies of the nation should lie with Parliament, not with Courts". Underlining the snag in the Constitution which made the courts perceive an inherent contradiction between

fundamental rights and directive principles, he urged the Parliament to do away with this contradiction so that the fundamental rights were subservient to directive principles.

The Seventeenth Amendment Act, 1964 again placed a number of land laws in the Ninth Schedule thus saving them from the jurisdiction of the Supreme Court.

The purpose of reciting the old but somewhat unfamiliar history is to bring home the point that the pressures of social dynamics had removed precisely the right to property from judicial control and vested it in the hands of the legislature. In relation to property, at least, no due process was implied.

In the 1967 case of *Golak Nath* the Supreme Court by a majority of one overruled the previous decisions as having proceeded on an erroneous view of the scope of article 368. Patanjali Shastri, C.J. had contended in the earlier case of *Shankari Prasad* that the contradiction between articles 13(2) and 368 was resolved as the expression 'law' in article 13(2) covered only ordinary legislation and not amendments which were 'constitutional' laws enacted by Parliament in its capacity as a constituent body. By thus interpreting the Constitution could article 368 come into full play. This decision now stands reversed. Consequently, the Parliament ceases to have power to amend fundamental rights and its acts of the past in this sphere have been condoned. In the Court's new theory, the amendments of article 31 do violate the fundamental right pertaining to the possession of property. The judgment clearly effaces the history of the social philosophy that legitimatised the change. It is not only a dramatic innovation it has brought about an anti-climax by challenging the very concept of parliamentary democracy. If the Supreme Court would have paused to think of the emerging political forces after the electoral 'revolution' of February, 1967 which would make it exceedingly difficult for the Parliament to amend the Constitution, it would not have thought of putting legal obstacles in the way. For, now, the legal obstacles might prove to be superfluous.

In the final analysis, the fact has to be admitted that the amendment of the Constitution depends not only on the prescribed legal provisions for change but also on the predominant political and social groups in the community and their ideological orientation to questions of rights and State obligations. If the fundamental rights suit them they will not alter them even if the alteration can be done by an ordinary process. If, on the other hand, many of them wish to see them altered, it will be done, even if the process involves legal complications. This is not to suggest that judicial interpretation on legal issues is unimportant. But the legal

obstacles can be removed depending on the circumstances and the thinking that surrounds them.

If the judges have founded their verdict of the inviolability of the fundamental rights they have done so on wrong logic and wrong facts. The verdict can be countered systematically:

1. The Constitution does not provide for its amendment by a newly convened Constituent Assembly whatever be the content of the articles to be amended.
2. The Supreme Court in all previous cases has acquiesced in the right of the Parliament to amend the fundamental rights.
3. Since we have largely inherited the British pattern of Government, the underlying principle of Parliament as a better representative of the people's interest has been well established.
4. The argument, that for an issue of such grave importance as amending fundamental rights, a Constituent Assembly should be revived, is invalid, because even the original Constituent Assembly was not duly representative for it was not an elected body. In fact, the Parliament is not only fully representative, it has inherited the powers of the Constituent Assembly as a matter of historical fact.
5. Even in the Constituent Assembly the suggestion for treating property as non-fundamental was aired. If that can even now be accepted the practical difficulties arising out of the Supreme Court judgment can largely be removed. But whether this can be done without the reversal of the judgment is a formidable problem. The crucial issue now is: Either the Government gives up all consideration of policies, like nationalization of banks or socialization of urban property, or the country should be prepared to adopt a new Constitution.

But, the simple solution lies in amending article 368 which permits its own amendment to the effect that the Parliament is empowered to amend at least article 31, if not the whole of Part III. The Supreme Court has confused 'amendment' of article 31 as 'abrogation' of the general fundamental rights. It has also misconceived that the State's intervention or acquisition of private property shall always in future mean a violation of fundamental rights. The absence of the due process clause in the Constitution ensures the fact of the Supreme Court not being given the power of Judicial Review in such cases. The Court did not realize that by posing a dam on social and economic development, it was opening the floodgates of violence and subversion. The fear that the conservatism of the judges might prove to be a barrier to all progress,

has not been belied by the majority judgment in the case under discussion. In thinking the Court flows against the tide of events.

I, on the basis of law and precedent, therefore, hold that in case the restrictions on fundamental rights included in Part III are not adequate to meet the demands of a developing society, especially in relation to article 31, the Parliament should be allowed to continue to intervene from time to time; of course, the Parliament ought to see, in its own interest and the interest of the people it represents, that its acts prove to be correctives rather of fundamental rights of the citizens. But, obviously, the Parliament has to strike a balance somewhere between the interests of the individual and those of the common man. Only Parliament is amicably suired to do this. I am inclined to disagree with the view advocating an unqualified supremacy of the Constitution or the Judiciary. Such a doctrine has already been exploded. In the ultimate sense, the Parliament has to be sovereign and in the exercise of its powers it can provide for certain methods by law for ascertaining public opinion on issues of vital importance. It can, for instance, in the present contingency, provide for a referendum. But to say that Parliament should accept the dictation of the Courts in policy matters would be to create a wrong political tradition and ignore the perspective of social philosophy inherent in the political system—the philosophy inspired by *Dharma* and the concept of 'Welfare State'.

## *Golak Nath : A Culmination of a Trend*

•T. K. TOPE†

“GREAT CONSTITUTIONAL PROVISIONS must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimately guardians of the liberties, and the welfare of the people in quite as great a degree as the courts,” said Mr. Justice Holmes in *Missouri Kansas and Tames Rly Co. v. May*, 1945, U. S. 267-270.

The *Golak Nath* case has raised many important points of constitutional interpretation, but more than that it has raised the question of the extent of the authority of the Supreme Court of India. An analysis of the recent judgments of the Supreme Court leads one to conclude that the Court is abandoning its earlier role which was observed in *A. K. Gopalan's* case when the Court refused to read the concept of 'due process of law' in article 21 of the Constitution and left the matter of protection of life and liberty to the legislature. The attitude of the Court towards individual liberty can be seen in the *Kathi Kalu* case and the *Makhan Singh* case. The ambit of protection given to a person accused of an offence regarding the right against self-incrimination has been considerably curtailed by the Court in the *Kathi Kalu v. State of Bombay*. The Court accepted in earlier days the doctrine of collective wisdom of the legislature. In *Makhan Singh's* case, the Court laid down that the proceeding taken under S. 491 (1) (b) of Criminal Procedure Code also fall under article 359 (1). Hence, the prohibitions contained in article 359 (1) and the Presidential Order apply as much to the proceedings under S. 491 (1) (b) as to those under article 226 (1) and article 32 (1). In the realm of right of property, the Court had also accepted the right of Parliament to amend the Constitution if necessary. The *Shankari Prasad* case is an illustration of this attitude. But since the pronouncement in

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*K. K. Kochunni's* case the attitude of the Court appears to have undergone a change. The Court which in *Gopalan's* case rejected the plea that article 21 is to be construed along with article 19, accepted a similar plea as regards article 31 and laid down:

Indeed uninfluenced by any such (Police power) doctrine, the plain meaning of the clear words used in article 31(1) of the Constitution enables the state to discharge its functions in the interest of social and public welfare which the State in America can do in exercise of police power. The limitation on the power of the State to make a law depriving a person of his property, as we have already stated is found in the word 'law' and that takes us back to article 19 and the law made can be sustained only if it imposes reasonable restrictions in the interest of the general public.

Similar view was expressed as regards the relations of article 19 and article 21 in *State of Maharashtra v. Prabhakar*. In that case the Court laid down the following important points:

- (1) If one loses his freedom by detention, he loses all the other attributes of freedom enshrined in article 19;
- (2) Personal liberty in article 21 is the residue of personal liberty after excluding the attributes of that liberty embodied in article 19;
- (3) Personal liberty included in article 21 is wide enough to include some or all of the freedoms mentioned in article 19, but they are two distinct fundamental rights; a law to be valid shall not infringe both the rights. Control of any article by article 19 necessarily means a wider range of judicial power. For, reasonableness of restrictions necessarily gives power to the judiciary to decide reasonableness or otherwise of restrictions.

*Vajravelu* case is another indication of this trend. The fourth amendment of article 31 in 1955 took away the power of the Court to decide on adequacy of compensation. However, the Court in *Vajravelu* case observed as follows:

If the legislature makes a law for acquiring property by providing for an illusory compensation or by indicating the principles for ascertaining the compensation which do not relate to the property acquired or the value of such property at and within a reasonable proximity of the date of acquisition, or the principles designed are so arbitrary, that they do not provide for compensation, at all, one

1. See article 31(2): "No such law shall be called in question in any court on the ground that the compensation provided by the law is not adequate."

can easily hold that the legislature made the law in fraud of its power.

No doubt these views aim at protecting whatever little right to property has survived under the Constitution. But they also expand the power of the judiciary. This desire on the part of the Supreme Court to uphold the authority of the judiciary and expand its extent is also seen in the *Special Reference* No. 1 of 1964 when the Court put many limitations on the privileges of the legislature in order to uphold the authority of judiciary. In *Naresh Mirajkar v. State of Maharashtra* a similar desire is clearly seen. It is submitted that the dissents of Sarkar J. in the *Special Reference* case and of Hidayatullah J. in *Mirajkar's* case really represent the correct position of law in this behalf. But the majority in both these cases appears to have considered the question of the authority of judiciary as more important. In *Mirajkar's* case inherent power of the High Court is considered as superior to the fundamental rights of the press. The oft repeated statement, that the Constitution is supreme, seems to have been forgotten, and a power not mentioned in the Constitution is considered competent to deprive a person of his fundamental rights guaranteed by the Constitution. *Golak Nath's* case is the culmination of the trend seen in the Supreme Court since *Kochunni's* case. The Supreme Court thus denied to Parliament the power of amending provisions relating to the fundamental rights, if the amendment results in abridgement of these rights. The consequences of this decision are far reaching and it would not be possible to visualize all consequences. It would be, however, worthwhile considering the question whether the ninth amendment is valid. This amendment authorizes the Government of India to hand over the Berubari Union to Pakistan. Such a transfer would result in depriving the citizens of India of their fundamental right under the Constitution, particularly, the right to property. Calcutta High Court considered this problem in *Sudhanshu's* case.<sup>2</sup> This decision was given before the *Golak Nath* judgment. It would be interesting to consider the effect of *Golak Nath's* case on this amendment. It is submitted that this amendment becomes unconstitutional as a result of *Golak Nath's* case.

There is another point. Article 334 of the Constitution lays down that the special representations for the Scheduled Castes etc. shall cease to have effect on the expiration of a period of 20 years from the commencement of the Constitution. Suppose in 1970 it is decided to extend the period. An amendment of the Constitution would be necessary. But such an amendment would indirectly affect the fundamental rights under articles 14, 15 and 29. Similarly an amendment of article 291 dealing

2. A.I.R. 1967 Cal. 217.

with Privy Purse would indirectly affect the rights to property. Would it then mean that such amendments would be unconstitutional?

What is the remedy if the majority view in *Golak Nath's* case is not to be law. Following appear to be various alternatives.

1. Amendment of article 13 by incorporating an explanation to the effect that the term 'Law' does not include 'Constitutional Law'.
2. Amendment of article 368 making it clearer: (a) that the article also lays down the power of amendment; and (b) that Parliament shall have power to amend even Part III of the Constitution.
3. Wait till the Supreme Court reconsiders its view in a later case. It is understood that a similar problem is before the Court at present.

First two alternatives, though attractive, may not be adopted. For, such an amendment itself may be challenged in the light of the majority view in the *Golak Nath's* case. The division in the Court was 6 to 5. It is likely that a future Court might overrule the *Golak Nath's* case and that would be a preferable alternative. It seems that what happened in the United States of America at the time of 'New Deal' is being repeated in India. There the Congress gave up the course of legislation and the Supreme Court gave up the earlier attitude.

# *PROCEEDINGS*

## Opening Session

**Subject:** Issues, implications and angles arising from the Judgment of the Supreme Court in *Golak Nath's* case.

**Chairman:** Mr. Justice M. Hidayatullah.

**Rapporteur:** Professor T. K. Tope.

**L. M. Singhvi:** Mr. Justice Hidayatullah, members of the presidium panel, distinguished guests, ladies and gentlemen:

I consider it a privilege to welcome you to this, the First Convention on the Constitution which the Institute of Constitutional and Parliamentary Studies has sponsored in collaboration with The India International Centre, The Bar Association of India and The Indian Commission of Jurists.

The Convention, we think, is a unique event of profound significance and will lead to a deeper analysis, elucidation and understanding of the structure and dynamics of our constitutional system and our democracy. President Woodrow Wilson once said: "No more vital truth was even uttered than that freedom and free institutions cannot long be maintained by any people who do not understand the nature of their own government." The sponsors of the Convention hope that these deliberations will contribute to a deeper comprehension of the Constitution of India and its philosophy as well as the nature of our basic institutions.

The subject of the Convention is "Fundamental Rights and Constitutional Amendment." The choice of the topic was undoubtedly dictated by the high degree of contemporaneous importance it enjoys in the wake of the judgment of the Supreme Court, delivered on the 27th February, 1967 in what is known as *Golak Nath's* case. Since the judgment, there has been a widespread discussion of and comment on the subject in the press. More, particularly, Lok Sabha has discussed the matter for successive sessions on a private member's bill, moved by my distinguished friend Mr. Nath Pai. Now that the bill is before the

Joint Committee, these deliberations in this Convention would be of great practical and persuasive value. I may point out, however, that the basic question of the amendability of Part III of the Constitution still remains a live and controversial public issue. Indeed certain political parties are so deeply and diametrically opposed to any enabling provision to amend Part III of the Constitution that they have declared their decision to disassociate themselves from the work of the Parliamentary Select Committee.

The opposition to the doctrine of amendability of Part III of the Constitution arises partly from the feeling that the amending power has been used excessively, indiscriminately and in a light-hearted and cavalier manner. The quality and content of constitutional amendments lead many to welcome the warning contained in the judgment of the Supreme Court. It is argued by them that Part III represents a constitutional settlement which cannot be the plaything of transient party majorities. Others argued that the fundamental rights were reserved by sovereign people of India to themselves and are, therefore, immutable and transcendental and beyond the ordinary amending procedure. It is on this philosophical supposition that they advance the suggestion for referendum and for convoking a constituent assembly. It is claimed that a constitution amendment act under article 368 is also 'law' within the meaning of article 13(2) and has, therefore, to be tested on the touchstone of Part III. Those who apprehend executive and legislative inroads undermining the sacrosanctity of fundamental rights hail the majority view and the role of the judiciary as a trusted sentinel on the watch tower of liberty.

On the other hand, there is a sizeable body of opinion among jurists, scholars, administrators and statesmen who think that an unamendable constitution is a contradiction in terms, a veritable anachronism. They think that no contrivance of human wisdom could be eternal, and inviolate and that the constitutional system is an evergrowing plant and not a fossil. As Thomas Jefferson put it: "Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment...Laws and institutions must go hand in hand with the progress of the human mind...We might as well require a man to wear the coat that fitted him as a boy, as civilized society to remain ever under the regime of their ancestors."

Human Rights and other similar declarations do postulate an irreducible minimum in the field of fundamental rights. Juridical interpretation of the amending power and procedure with particular reference to Part III of the Constitution is to be found in the three well-known Supreme Court judgments, in the cases of *Shankari Prasad*, *Sajjan Singh* and *Golak Nath*. These judgments contain copious annotations on the history and background of the relevant constitutional provisions and a detailed discussion of the text and context of these provisions. In addition to these judgments we have also circulated a number of learned papers. All these, I am sure, make an adequate and substantial corpus of basic materials and interpretations. I need hardly say that except for the staff paper prepared in the Institute of Constitutional and Parliamentary Studies, which is a detached presentation of issues, the sponsors take no responsibility for the views and opinions expressed in the papers submitted and circulated to the Convention.

We do not have to embark on a voyage of discovery to formulate and identify the principal issues which the Convention has to consider. We have sought to group these issues so as to make the discussion in each session pointed and purposive. Thus, I propose that in the opening session we would touch upon the issues, implications and angles arising from the judgment of the Supreme Court in *Golak Nath's* case. In the second session tomorrow morning we would discuss the quality and content of constitutional amendments, the nature of fundamental rights and amendability of the Constitution. In the afternoon session tomorrow which is the third session, we would give particular attention to the nature, extent and limitation on the Supreme Court's power of judicial review with particular reference to constitutional amendments and the doctrines of *Stare decisis* and 'Prospective overruling.' This session would be chaired by Shri N.C. Chatterjee. On Sunday morning in our fourth session, which would be chaired by Shri M. C. Setalvad, we would discuss the amendability of the Constitution under judgment of the Supreme Court and steps, if any, to be taken to overcome the difficulties. The fifth and concluding session would be chaired by Shri S. K. Das. In this session, the Rapporteurs for each session would highlight the trends of discussion and there would be room for general comments.

As to the procedure for the conduct of our deliberations, I may mention that for each business session of the Convention we would have a presidium panel. Each member of the presidium panel could make a brief opening presentation and then ask clarification of any other member of the presidium. Interventions from among the participants in the Convention would then be invited and the time for such interventions would be regulated by the Chairman of the presidium panel.

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The opposition to the doctrine of amendability of Part III of the Constitution arises partly from the feeling that the amending power has been used excessively, indiscriminately and in a light-hearted and cavalier manner. The quality and content of constitutional amendments lead many to welcome the warning contained in the judgment of the Supreme Court. It is argued by them that Part III represents a constitutional settlement which cannot be the plaything of transient party majorities. Others argued that the fundamental rights were reserved by sovereign people of India to themselves and are, therefore, immutable and transcendental and beyond the ordinary amending procedure. It is on this philosophical supposition that they advance the suggestion for referendum and for convoking a constituent assembly. It is claimed that a constitution amendment act under article 368 is also 'law' within the meaning of article 13(2) and has, therefore, to be tested on the touchstone of Part III. Those who apprehend executive and legislative inroads undermining the sacrosanctity of fundamental rights hail the majority view and the role of the judiciary as a trusted sentinel on the watch tower of liberty.

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Of course, it may be mentioned here that there are provisions in the American, Japanese and West German Constitutions which are in actual fact virtually unamendable. What is more, the Universal Declaration of



in it because if one were to read article 368, one would find that Parliament is really not supreme as to amend the whole Constitution. The Parliament by itself cannot amend the entire Constitution. At least some of its provisions are protected from such action because concurrence of not less than half the States is necessary. Therefore, it is easy to see that the sovereignty of the kind which is claimed on behalf of Parliament, by those who propagate that view, does not really exist.

Article 368 undoubtedly is described as a Code. It is said to be self-contained and self-expository. But the question still remains whether, just as there is a curb on the sovereignty of Parliament in article 368 itself, there isn't somewhere else some other controlling factor which removes this sovereignty from Parliament? It is here that a difference between the leading proponents of the two views has arisen. Some say that because there is no mention of any exception beyond what is contained in the entrenched provisions in article 368, there is no part of the Constitution which is beyond the powers of Parliament to amend by a special majority in the two Houses. Others think that because the fundamental rights are fundamental and because it is stated that any law which tries to abrogate or repeal them will be void, any attempt to do this, whether by way of ordinary law-making or even by the process of amendment, would be beyond the powers of the Executive or Parliament. Therein lies the main difference between the two views and this Convention may do well to ponder upon this aspect of the question with a view to finding out for itself, whether such a curb does or does not exist by way of article 13(2) of the Constitution. This part of the enquiry, therefore, leads us to the next step, namely, whether the constitutional amendment can be described as a law for the purpose of article 13(2). Now, it is conceded on all hands, and I do not think there would be anybody found in this Convention who will be able to say that a constitutional amendment is not law proper. That it is intended to operate for all time till it is taken away by a special procedure, or that there is a little more dignity about it than the ordinary day-to-day laws made by Legislatures does not make it any the less law. That is one view which has been taken in the later cases that happened to come in the Supreme Court : and the question is whether that is not the right view to take of the word 'law' as used in article 13(2).

It is interesting to note that there is a definition of law which does not say that "this definition shall not include an amendment of the Constitution"—words which would have been easy to add if it had been so desired. However, it is argued the other way round also that it does not say that an amendment of the Constitution shall be a law for the purpose of Part III. So the matter is at large again, and it will depend

Interventions relating to the discussion in the opening session would be made in the second session.

It would now be appropriate for me to present to you the presidium panel for today:

Mr. Justice M. Hidayatullah (Chairman)

Mr. M.C. Setalvad

Acharya J.B. Kripalani

Mr. S.K. Das

Mr. N.C. Chatterjee

Mr. Nath Pai

Professor T.K. Tope will be the Principal Rapporteur for the opening session.

Mr. Chairman, may I now request you to give us your opening remarks.

**M. Hidayatullah:** Dr. Singhvi, ladies and gentlemen: I do share in some measure the responsibility for the Convention, not as a participant, but because of participation in the judgment of the Supreme Court, which has led to this Convention and the discussions which have taken place in newspapers, in Parliament and outside. You will forgive me if I speak with a little restraint this evening, for the simple reason that so far as I can see the matter is not yet a dead issue, and it is possible that judicial opinion may be called for, on some future occasion on the same topic, or something allied to it.

I will, therefore, not try to project my own opinions upon the meeting, but would rather confine myself to analysing what has happened already and try to place before you the lines of thought on which you should move with a view to making a success of this Convention.

I am glad in a way that I am flanked, both on my right and on my left, by men of great eminence and even this task which I assume as the President of this Convention at its first session is made easy for me because whatever I omit, or whatever I fail to state, will be made up by those who follow.

The issue is a very plain one and it involves the question whether the amendability of the Constitution, as it is granted by article 368, makes it possible for Parliament and the State Legislatures to amend any part of the Constitution at their will. Those who claim sovereignty for Parliament admit it, and there are not a few who think that it is entirely against the order of constitutional Government and Constitutions to put a curb upon the amending power of Parliament. A fallacy is involved in

words the "State shall not abridge or take away" fundamental rights. There, of course, is the justiciability of the fundamental rights and the guaranteed remedy provided by the Constitution. Therefore, the question arises, whenever in the operation of the directive principles, a heavy inroad is made upon fundamental rights, is not the question open to the Courts to consider because the directive principles are not justiciable, whereas the fundamental rights are. And this contrast between the two parts which stand side by side in the Constitution seems to indicate something to me which, probably, it may not to others, and I say again, I am speaking with great restraint because I do not wish to say that mine is the only right view.

Then comes the question of the amendment. Several amendments have taken place. The American Constitution had its 25th amendment recently, after nearly two centuries, but we are reaching and overtaking that number in the seventeenth year after we have had this Constitution. No doubt, people say that it is because of the numerous and recurring amendments that the view of the Supreme Court was probably induced. I say no. We as Judges, do not consider it a matter at all for our consideration because it is not our policy to consider the political aspects of a question. We are only interested in seeing whether a particular action is right or wrong. The Judges do not care whether there are 21 amendments or 210 amendments provided the amendments are proper. We do not attribute any such thoughts to the Judges because I do not think any one of us ever entertains such thoughts. However, with so many amendments already made, you will find that the people, at any rate, think that the way in which the Constitution was supposed to be worked has not been properly observed.

Of course, no constitution can be really useful if it is completely rigid, and to that extent our Constitution cannot be described as rigid at all. There are only two dozen articles in the fundamental rights chapter, and even among those I do not think there are more than seven or eight which really impinge upon fundamental rights proper. The rest are procedural, definitions and the power to make some laws.

Now the question arises whether there are not indications in the fundamental rights articles themselves, which are of a very fundamental character, namely, that these are to be segregated and kept away from the amending process. Of course, the Constitution does not say that a certain portion of it shall not be amended by any process at all. The American Constitution has got such a provision. The republican character of the French Constitution can never be altered and the Turkish Constitution says that with regard to the republican character of the Constitution, a proposal shall not even be moved. But all this can

upon your approach to the problem how you view the importance of a constitutional amendment *vis-a-vis* the importance of article 13(2), which only permits the making of law by a State without abrogating or removing any fundamental right.

It must be also remembered, as I had the privilege to point out, that the word 'State' is defined to include Parliament, the two Houses of Parliament, the Legislatures of the States and other authorities. Why was it not found necessary only to say that Parliament or its two Houses, or the Legislatures of the States shall not make any law abrogating or repealing any of the fundamental right? If it had been so said, it might conceivably have been argued that by the word 'law' was meant the ordinary day-to-day law, such as Parliament makes or the Legislatures of the States make. When the word 'State' is used, is it not for you to consider that it shows a conglomeration of all the powers which are possessed by the people's representatives in whatever sphere they may be? The State is the sum total of all—Parliament, Legislatures, the President, the Governors, the Cabinet, all the Ministers and everybody else. It shows, therefore, that the Constitution says in rather strong terms that the State shall not make a law, thereby putting a curb upon all the operatives of the State, viewed collectively, as well as separately. That is one view that has been expressed before. It may not be the right view and that is, of course, a matter for you to judge for yourself.

Then comes the question whether the fundamental rights can be improved or only an amendment of the nature against which article 13(2) would operate is void. Article 13(2) merely says that no law abridging or removing any of the fundamental rights would be good. It has been said that if any of the fundamental rights are improved, then there would be no objection. It is for you to see whether the irreducible minimum of fundamental rights was not contemplated by this article and by the Founding Fathers.

Next the question comes: what is to happen to the directive principles which have also been included, and which, if implemented, must certainly make inroads upon the fundamental rights? And there lies the rub.

We have to see how far the directive principles, which are not justiciable can be used to make an inroad upon the fundamental rights. That is to say, where the directive principles go a little into the reach of fundamental rights and try to curtail them: whether that action can be upheld or not? Now, if article 13(2) says that the State shall not do this, I take it—and that seems to be the view that appeals to me, may be I am wrong—that the directive principles stand injunctioned by the

In the field of agrarian reform, the landholders, who for years had been upon that land and living probably as absentee landlords, had already got several times the value of that land and the question was whether in spite of all the gains to them, the full market value as compensation must be still paid to them. Now the door was only closed by a Patna High Court decision and it is a pity that the Patna High Court decision was not brought before the Supreme Court before the matter was taken in hand to amend the Constitution. It is possible that another view might have been taken by the Supreme Court. But as it is, when the first amendment of the Constitution came, it brought in its wake the fourth amendment and an article which removed from the projected agrarian law the bar of articles 14, 19 and 31. By that decision the door was open for agrarian reform law to be made without absolute market rate compensation.

That is the stage at which we reached in the first and fourth amendment. The first amendment was challenged before the Supreme Court and by a Court decision, (not the whole Court but by a Constitution Bench of five judges) it was held to be perfectly valid. The argument then was that the Constituent Assembly, having become the First Parliament, was not bi-cameral and the procedure which was laid down in article 368 of two Chambers was not capable of being followed. Other arguments were also raised that this was against article 13(2) and, therefore, it could not be accepted. The Court's view was that both the arguments were wrong and that the amendment was valid.

The opinion lasted for 15 years, when it had to be reconsidered in *Sajjan Singh's* case, and at that time the same arguments were raised, namely, an amendment of the Constitution is law. The learned lawyer, who argued the case is with us, and he is there to point out what the arguments were. It is not for me to detail them before you.

You are aware that a difference of opinion took place, three judges going one way in favour of *Shankari Prasad* and two others being a little doubtful of the correctness of the view expressed in *Shankari Prasad's* case.

The question then arose in another case and the matter was referred to the whole Court of eleven Judges of the Supreme Court for them to reconsider the question which was decided in *Shankari Prasad's* case on the basis of the First Constitutional Amendment and the powers under article 368. Diverse views were expressed by the judges, five learned Judges were of the opinion that there was no restriction on the powers of amendment in article 368; five learned judges held that there was a restriction and one judge held that there was an escape from it, because

be changed by revolution. This shows that constituent assemblies may fail in their objective, but they do attempt to make certain portions of the constitution everlasting—not that they can ever be everlasting. Nothing is. But such provisions can only be changed not by the process of ordinary law making but by some other process.

During the course of the years numerous amendments of the Constitution have taken place. The most significant of them, of course, are in the matter of property rights. I have been quoted over and over again, and I say it once more, it was a mistake to put the property right in the fundamental rights chapter. I may tell you that when the Declaration in France was drawn up, Lafayette sent his draft declaration to Jefferson and in that declaration there was a mention "*le soin de son honneur, and droit de propriete*" that is, "the care of his dignity (I am expressing it literally) and the right in property" were definitely included in the declaration. Jefferson who was asked to comment on it put brackets round the words "*droit de propriete*" that is, the "right in the property" and indicated thereby that they were not to be included in the Declaration.

You will remember that the Virginia Declaration and the Declaration against the violation of rights in America, and the Declaration which was made finally had to be changed in language, also indicated the same. Of course, the French Declaration did not accede to what was told to Lafayette, but Lafayette was under the influence of the French physiocrats and he did mention rights of property there. So the question whether property rights should have been included in the Constitution of India in the chapter on fundamental rights, might well have been gone into a little more elaborately. But as it is, it is there. The first amendment came immediately after the Constituent Assembly had ceased its functions and had turned itself into the first Parliament of India. The amendment was necessitated because of the case of *Bela Banerjee*, where it was stated by the Supreme Court that by "compensation" was meant a "just and proper compensation".

In the debates, in the Constituent Assembly, Pandit Jawaharlal Nehru did say that they never expected that there would be an interference by any of the judicial bodies because article 31 as it stood only allowed the Courts to come in if there was a fraud on the Constitution. The Constitution had provided that a law taking away or abridging property rights, would either indicate the compensation itself, or lay down the principles on which compensation shall be paid. But as it was, the decision was given and it led to a remarkable situation in that, no Act of a welfare State, which required the acquisition or requisition of property, could go on unless full market compensation was given.

prospective over-ruling. Prospective over-ruling is not an ancient process. It is not so old as some people imagine, as Professor Friedmann has pointed out in an article in the *Modern Review*. It is this: the Court made their decision operate from a particular point of time. As Justice Clarke, who was to be with us, said: the Constitution does not say or prohibit that the Supreme Court's decisions should be prospective or retrospective. Therefore, it is open to the Court to say that a particular decision shall apply from a particular date or from the date of its decision. In a recent case the House of Lords overruled the old case of *Chandler* not retrospectively according to the latest theory, but from the date of the House of Lord's decision. This principle was made applicable to the case by five learned judges who held that they over-ruled *Shankari Prasad's* and *Sajjan Singh's* cases prospectively but not retrospectively. One judge who did not think that the first, fourth and seventh amendments could be called in question, over-ruled *Sajjan Singh's* case but not *Shankari Prasad's* case, because that sustained the first amendment. That is how the matter stands.

The question for you to consider would be whether the doctrine of prospective over-ruling, which has been applied to civil cases but not in criminal cases, (as is quite clear from the *Link letter* case in the United States, which did not apply the *Mapp and Ohio* doctrine to the *Link letter*), is available for constitutional questions, particularly as article 13(2) says that a law shall be void. That is a question which I am sure will receive adequate attention at your hands.

Now, I must not delay you any further. I have already taken up a great slice of the time available this evening. But I hope that you will forgive me for having stated this matter at some length.

I shall now request you to attend to the Panelists who are here before me who I am sure will be able to throw much light upon these several problems and which, if I may say so, have been very ably and very properly analysed in the working paper placed in your hands.

I thank you for the honour you have done me by inviting me to preside over this first session and also for listening to me with attention.

**M. C. Setalvad:** The Convention has, as is clear from what the Chairman has told us, to consider very controversial and very important subject. This can be divided, I think, broadly into two aspects. One is the legal aspect and the other is what may be called the political or the philosophical aspect. It is important to remember how the questions have arisen.

As far back as 1951, in *Shankari Prasad's* case, it was accepted by a unanimous Court that article 368 contained a power of amendment which

of the First Amendment (with the Fourth) having been accepted for several years it contained within itself the authority to make an amendment of the same type. These views have been criticised all over the country and particularly the view of acquiescence which I propounded. But let us view the matter again. Professor Frank of the Yale University once put a ticklish question. In the course of his speech he said, suppose someone were to unearth today incontrovertible evidence that the Thirteenth Amendment of the United States Constitution was not validly adopted—would the Courts consider the argument? And he said, happily, not, because after a lapse of years, you do not consider an amendment which has been accepted. That it is the principle on which *Muller's* case in the United States partly proceeded. You know that the thirteenth amendment was first rejected by many States and then was accepted by the same States. If the question were judicially examined another question would arise whether ratification of 3/4th of the States was really available when some of the States had first rejected the amendment, and later on, on a change of Government, accepted it. Any such question, I am quite sure, the Supreme Court of the U.S.A. would not even pause to consider. The matter has gone into history and the amendment has gone into the Constitution and it must rest there.

A similar argument was used by the Supreme Court of the United States of America when the nineteenth amendment was challenged. The Supreme Court said that the nineteenth amendment was of the same character as the fifteenth amendment which had been there for 70 years and had not been questioned and they did not see that the amendatory power was wanting.

I do not wish to plead before you any aspect of the case. The judges will speak for themselves and the question is whether, after a lapse of so many years, it is for you to consider whether the Courts should go back to consider an amendment of the Constitution which is a part of the Constitution and has been approved by the Supreme Court. The reason given then might not be accepted. But there the matter ends.

Now the question remains of "prospective overruling." Here what happens is thus : five judges of the Supreme Court held that the amendment was proper; five other learned judges held that it was not proper; and one judge held that there was basis for it in the amended Constitution immediately prior to the enactment of the seventeenth amendment. That is to say, in his opinion, the legality could not be called in question because the Constitution as already amended gave authority for that amendment. The other learned judges who held that the seventeenth amendment could not be sustained, sustained it on the principle of



was wide enough to enable Parliament to amend Part III of the Constitution. Later, I think in 1964, the matter came again before the Court and it was then held, also by a Bench of five, two learned judges expressing some doubts, that article 368 operated widely enough to include the power to amend Part III of the Constitution. Then came the present decision, *Golak Nath's* case, which is to be the subject of our discussion in the Convention. That was a decision by a majority of six against five. If one looked at the catena of Supreme Court judges, who have considered this question, including those included in the minority in the last judgment, we have thirteen judges who have taken the view in their opinions that article 368 contains a comprehensive power of amendment. Whereas against that we have the six, the present majority who have held to the contrary. But, of course, under the Constitution as framed, the Supreme Court has the power to overrule its earlier decisions. Therefore, the present decision of six against five is under article 141, a law binding on all the courts in the country.

I spoke a little earlier of the two sets of questions, as it were, which arise. As to the legal aspect of the matter, I am sure, the papers to be here discussed will go very comprehensively into them. The main subject of controversy, on which I suppose the whole decision must stand is the interpretation of the word 'law' in article 13 and a reading of article 368 in order to ascertain whether what results from the operation of article 368 is law at all within the meaning of article 13. We must remember that article 368 is careful enough not to use the word 'law'. The majority who have understood article 368 or the operation of article 368 as resulting in the enactment of 'law' have gone to the procedure envisaged by article 368 and come to the conclusion, as far as I know, that it can only result in a law, and that the word 'law' in article 13 is comprehensive enough to include a law of the kind resulting from the operations of article 368. That is the main plank, so far as I can see, of controversy in the legal aspect of the matter. Of course, there are numerous subsidiary questions which have to be looked at and the Chairman has already indicated some of them to you.

But to my mind, of greater importance are the constitutional and political implications of this decision. It seems as I understand it, to lay down that a Parliament consisting of two Houses, one elected on adult suffrage directly, the other consisting of members elected by Legislatures, which are themselves elected on adult suffrage, is incompetent to modify or take away the rights conferred by Part III. That itself is a proposition which should make us pause. Is the Parliament of a sovereign democratic republic, incompetent to alter the rights which in 1950 it considered fundamental? At any future time whatsoever, even

The reasons for and against the decision are fully set out in the majority and minority judgments; some of these reasons are also set out in the two earlier decisions of *Shankari Prasad's* case and *Sajjan Singh's* case. These reasons have also been admirably summarised in the Working Paper which has been submitted to the participants of this Convention.<sup>1</sup>

I do not think that any useful purpose will be served at this stage by going over those reasons in detail pro and con. One can only say that he either accepts as good the reasons given by the majority or the reasons given for the minority view. Personally and speaking for myself, I am inclined to the minority view. On all the four critical questions, namely: (i) the meaning of the word 'law' in article 13, (ii) the true scope and effect of article 368, (iii) the power of legislation under articles 245, 246 and 248 read with residuary item 97 in List I, and (iv) the doctrine of implied limitations,—I am in agreement with the minority view.

For practical purposes, it is not enough to say that the minority view is correct. We must proceed on the proposition that the majority view is the law declared by the Supreme Court and is binding on all courts within the territory of India. What then is the position?

I think that the first question that should engage our attention, is this:

Is the decision in *Golak Nath's* case likely to foster or impede the growth of the nation, and (to use the words of the 'Preamble') to secure to all its citizens—justice, social, economic and political, equality of status and opportunity and dignity of the individual and the unity of the Nation?

In over-ruling the decision in *Shankari Prasad's* case, Subba Rao, C.J. expressed the view that "otherwise the future progress of the country and the happiness of the people will be at stake." It is here that I join issue with his Lordship. I can understand the view that fundamental rights are transcendental in the sense that they occupy a higher place than ordinary contractual rights or even ordinary statutory rights. But surely even fundamental rights may require change with the growth of the nation. The fundamental rights under our Constitution embrace a large variety of rights, including such rights as educational and cultural rights, right against exploitation, right to property and right of less advanced sections of society. Without being guilty of casuistry, I think that a real difficulty arises out of the fact that all the rights compendiously called "Fundamental Rights" in Part III of the Constitution are not all

1. For the working paper, see *Fundamental Rights and Constitutional Amendment*, p. 1.

of what is valid up to a date and what is not valid beyond that date.

Those broadly are the issues which arise. I have said that they are highly controversial and will have to receive our best attention. It is not surprising, having regard to the controversial nature of the judgment, an eminent writer on the Indian Constitution has said: "It is submitted that the majority judgment is clearly wrong, is productive of the greatest public mischief and should be reversed at the earliest opportunity."

**S. K. Das:** I wish to preface my remarks with a few words of caution. In considering the questions which arise for discussion, I think that we should refrain from casting aspersions on the judges or imputing bias in the making of decisions. On important constitutional questions there may be honest differences of opinion—and this is reflected in many decisions not only of the courts in India but of courts in other countries as well. In reaching decisions on constitutional questions of far-reaching consequence, the judges have to take into account various considerations; these considerations often range over a very wide field, and it is not always easy to determine the essential priority. The judge's own experience, his appreciation of the historical forces shaping the growth and destiny of the nation, his reading of the Constitution in its organic integration representing the life of the nation as it were—all these go into the judge's decision-making. It is a difficult task which the judges have to perform, and in discussing questions which so vitally affect the life and growth of the nation, the discussion should not be brought down to the level of mere cynicism, formal legalism or a consideration of bias in judges. We do not enhance the prestige of the nation by such an approach. On the contrary, we should try to raise the discussion to the higher level of a consideration of the growth and development of the nation in future. It is well to remember that life is not all logic, and law marches with life. It is from this standpoint that I wish to make my observations.

I may start with the proposition that the decision in *Golak Nath's* case, as long as it stands, is binding on all courts within the territory of India (article 141), to the extent that it declares that "Parliament will have no power from the date of the decision to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein." The fact that the decision is by a majority of one and overrules two earlier decisions of the Supreme Court, makes no difference to the position, because: (a) the Supreme Court has power to review any judgment pronounced or made by it (article 137); and (b) a judgment by even a majority of one is the judgment of the Court [article 145 (5)].

It is not very clear to me if the majority view is that Parliament can by law enlarge a fundamental right, but cannot take away or abridge it. If that is the view, then the power of enlargement must be traced to the power of legislation under article 245 etc., but that power is 'subject to the Constitution' and this may again result in a contradiction. Subba Rao, C. J. has very summarily dismissed this difficulty by saying that it is arguing in a circle. I do not think that it can be so easily disposed of. If the power is derived from article 368, it would be somewhat anomalous to say that it gives power to enlarge but not the power to abridge. This really brings out the distinction between an exercise of ordinary legislative power and an exercise of constituent power in amending the Constitution. The fear is that the sweeping effect of the decision in *Golaknath's* case may stifle all progressive legislation which Parliament may seek to pass in order to obtain the objects mentioned in the Preamble to the Constitution. This, I believe, to be the real reason for desiring a reconsideration of that decision.

The next question is—what should be done about the decision in *Golaknath's* case. Those who think that the decision is correct and also in the national interest will naturally say that nothing need be done about it. There are others who think that time alone would show what impact the decision has on future progressive legislation and nothing need be done in a hurry. But those who think that the decision does not correctly interpret the Constitution and will stifle progressive legislation, naturally want some steps to be taken to remedy the situation created by the decision. For them the question is—what are those steps?

Several views have been expressed with regard to these steps. These views may be summarised under three categories. One proposal made is to follow up the suggestion, tentatively thrown out by some of the judges in *Golaknath's* case, that Parliament should make a law under residuary item 97 of List I of the Seventh Schedule, to call a constituent assembly for making a new Constitution or radically changing it. This proposal is beset with many difficulties. Apart from these difficulties, a radical objection has been pointed out by many eminent jurists, namely, if Parliament cannot itself take away or abridge any of the fundamental rights, how can it create a body to do so? In my opinion, this is an objection of substance. Therefore, if this proposal is to be followed it should be necessary to obtain a clear opinion of the Supreme Court on the implications of the proposal by a reference under article 143 of the Constitution.

Another proposal is that Parliament should make amendments in article 368 and/or such other articles as may be necessary, to make it clear that Parliament has the power to amend any of the provisions of

fundamental in the same sense. Some are fundamental in the sense that they are natural and inalienable rights of men organised in society. Some other rights comprised in Part III are rights which owe their origin to historical reasons. There are again other rights which really arise out of the exigencies of the time when the Constitution was made. I agree that rights such as the right of equality, prohibition against discrimination, equality of opportunity in matters of public appointment, right to freedom of speech, freedom of religion, right of free movement etc., should be treated as rights which are inviolable and immutable in character. These are really rights which form the basis, as it were, of our secular democracy and should not depend on party aims or party alignment.

There are, however, other rights which cannot be so treated in a growing welfare State. Take for example the educational and cultural rights; these may require modification from time to time. Again, the rights in favour of backward classes of citizens, scheduled tribes and classes may require modification with changing circumstances. Take, again, preventive detention dealt with in article 22, which has often been characterised as a blot on the Indian Constitution. Surely it is not immutable in character. Several clauses of Article 19 refer to restrictions to be placed on the right to freedom in the interests of public order etc. One of the clauses refers to the operation of law in so far as it relates to the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business. It also refers to the making of any new law imposing restrictions in the interest of general public or for carrying on by the State, or by a corporation owned or controlled by the State, or any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise. All these restrictions may require change from time to time. They may be enlarged or abridged from time to time. As they form part of the content of the right to freedom guaranteed by article 19, any enlargement of the restrictions will be an abridgement of the right. The decision in *Golaknath's* case will prevent such abridgement in future. Similarly, the right against exploitation, protection of interest of minorities etc. may require modification. Under our Constitution, right to property is not an absolute right and is subject to social control; and the extent of the control may change from time to time. If the decision in *Golaknath's* case holds the field, there is a danger that the extent of control will be fossilized or frozen for all time to come. This will not be for the good of the country. I find it very difficult to accept the position that such rights as educational and cultural rights, right against exploitation, etc. should be immutable in our welfare State.

speaking on this subject is that I was the Chairman of the Fundamental Rights Committee. As Chairman of the Fundamental Rights Committee, I reminded my colleagues that this idea of fundamental rights was rather antiquated. It belonged to the 18th century. It is no more valid now, even in a democracy, which can modify what were considered fundamental principles in the 18th century so that nothing of them remains. For instance, our Parliament passed the Defence of India Act. I think all our fundamental rights are swept away with one stroke and the judiciary also cannot restore to us what has been taken away by Parliament. It is said that this was done due to an emergency. This emergency has lasted for five years. If an emergency can last for five years, I think it can last for ever unless we change the Government.

My task has been made easier by Mr. Setalvad by saying that there is a judicial aspect of this question and there is also a philosophical and political aspect. I would add that there is another aspect of the question which escaped the attention of my friend and that is the moral aspect. Apart from the philosophical and the political, there is the moral question involved.

What Mr. Nath Pai did by moving the Constitution Amendment Bill was to say that because the people of India are sovereign, therefore, the Parliament is also sovereign. I am afraid I do not agree with this. I read Aristotle's logic long ago and I think this is called the fallacy of four terms, it equates the people with Parliament and it also equates the people with the majority in Parliament. Let us consider, how does the Parliament arrive at its decision? It is by a majority. The Parliament, therefore, means the majority. I do not know what fallacy this would be. Aristotle has not made any provision for this. There is further fallacy involved when we consider that all legislation today is sponsored by the Government. Even a private bill today cannot be passed unless it is acceptable to the Government. This means that the sovereignty of the people is transferred not to the Parliament, not to its majority, but to the Government. This is absurd. It is neither morally or politically reasonable. I do not know if it is considered legally reasonable. We have in recent times the example of Goa. The Goanese people chose a Government. It was chosen to carry on the day-to-day administration of that territory. When it came to the fundamental question whether Goa should be a part of Maharashtra or it should be attached to the Centre, this fundamental question was decided through a referendum. This decision was against the decision of their representatives in the Government. I must submit that Parliament sometimes misrepresents the people. I can assure you there are many things done in our Parliament by the majority which the people do not like and do not accept.

Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein. Such legislation will have to meet the challenge of the decision in *Golaknath's* case and, unless the decision is reconsidered, is likely to be struck down. This proposal is, perhaps, the best if the Court can be persuaded to reconsider the decision.

A third proposal is to amend clause (5) of article 145 so that in future the decision of a vitally important constitutional question does not depend on a slender majority of one, particularly in the circumstances when if the earlier decisions of the same Court are taken, the majority really becomes a minority of the accumulated judicial wisdom of the country. In my opinion, this proposal requires careful consideration, and the amendment should be such as not to smack of a "packing of the Court". At the same time, I do not think that it is good that the inclusion or exclusion of a single judge, whom I call a marginal judge for want of a better expression, should tilt the decision one side or the other and thereby introduce instability by a change of the Bench. Perhaps, where the Attorney-General certifies a case to be of grave constitutional importance, it may be considered whether some Chief Justices of the State High Courts may not be asked to join the Bench. I am not making a definite proposal; all that I am saying is that the proposal to amend article 145 would require careful consideration in working out the details.

**J. B. Kripalani:** I am a layman. I am used to speaking at public meetings and in Parliament. But I am not used to speaking in the company of specialists. I am also a little apprehensive of speaking on the subject under discussion after what has been said before by eminent lawyers.

I am reminded of a story. A person accused of murder was taken before a judge and the prosecution lawyer began his argument. After he had finished his arguments, the prisoner said, "I have not committed the crime. But after hearing the arguments I feel that I have committed the crime." I am sure there will be lawyers here who would have upheld the sanctity of our fundamental rights but who will now argue against it.

My opposition to what Mr. Nath Pai has placed before Parliament in the form of a non-official resolution, was sudden. I did not know that such a resolution was being brought before Parliament. I must plead that I am not always present in Parliament, and when I heard that he was making a proposition that the Parliament can change our fundamental rights, I at once woke up and I thought he was saying something which I had never thought of before. My justification for

It should also be remembered that democracy today does not mean the will of the majority alone. Democracy has moved forward. It implies that the majority has to respect the opinions of the minority. If the majority wants to tyrannise the minority it is no democracy. Not only have the individuals rights in a democracy but also associations, parties, groups of people have their rights. These cannot be abrogated by a majority or the Government is not a democracy. I believe that our fundamental rights were meant to safeguard such rights of the people. They go into the realm of morality. They are not only legal rights but are also moral rights. I would add they are even spiritual. Suppose we are told that tomorrow there would be no freedom of conscience and that everybody should adopt Hindu mode of worship or Christian or Muslim, would that not affect the fundamentals of morality and religion? I am sorry to state that I do not mind what legal luminaries say about this. I am not concerned with that. I am concerned with the fundamental moral question and, therefore, also the political question. A law which is against morality in my opinion, is not a good law. Law must respect the moral feelings of the people. Law must take into consideration that we are living in an association. Now can one live in an association without moral principles? Certain moral principles are put in legal form. The fundamental rights have been put in legal language. Therefore, we must be careful when we tamper with them. If there are any inconsistencies, let them be removed.

Let us say that fundamental rights can be changed only by a referendum. Referendum is something which is allowed in some of the European constitutions. There can be no objection even to calling a new constituent assembly. Our Constituent Assembly, it is said, was not representative. Why was it not representative? Because the elections did not take place on the basis of universal suffrage. However, all classes and interests were represented in the Constituent Assembly. Congressmen by their votes sent men like Gopalaswami, Alladi Krishnaswami, Ambedkar, Kunzru and others. We wanted the Constituent Assembly to be representative. After all even if there is universal suffrage what we get are the representatives of the different groups and interests. Ours was, therefore, a very representative assembly. We turned that Constituent Assembly into a Parliament. For some time it used to meet as a Constituent Assembly and at other times it met as a Parliament. I do not see why there cannot be again another constituent assembly? After all the question of fundamental rights does not arise every day. We can wait for two or three years if need be, and when we have a general election we can refer this question also to the electorate. It should first meet as the Constituent Assembly. If the Constituent Assembly could meet as a Parliament I think Parliament can also meet as



I have also an idea that under the forms of democracy, a totalitarian Government can be established. How was Hitler's rule established? How was Mussolini's rule established? By the democratic process, of course. Having acquired power by the democratic process, they destroyed democracy. We must remember today, there are forces in India which take advantage of democratic liberty to destroy our liberties.

This controversy has arisen because, I will have to admit that, this Part of our Constitution concerning fundamental rights is not very scientifically conceived. I have no doubt that property rights should not have formed part of it.

It is said that law must contemplate a changing social order and it must provide for it. Of course, there will be a change in society but there are certain things which go to the very fundamentals of humanity and they do not change. Will there come any time, when people say that freedom of speech is bad, that freedom of conscience is bad? There can be no time when it will be said that a Government can silence the conscience of the people, and it will oblige people to think as it thinks. Such a conception will be totalitarian. Therefore, our Constitution lays down certain fundamental principles which can change only when human nature as we know it to-day changes. Supposing tomorrow our Government says that freedom of speech is abrogated. What is the citizen to do? He either follows the law or breaks the law. Must the citizen be put in such a position where his moral sense is against the dictates of the law? I think the moral sense is superior to the legal sense and I take my stand on that. There are certain provisions in the fundamental rights which are really fundamental and they cannot change with time. I agree that the fundamental rights as they stand today can be reshaped or reformed. The property rights should not form part of our fundamental rights. But there are certain rights which cannot be left at the mercy of the majority whatever be the majority, much less at the mercy of the Government.

I said in Parliament that we are sitting here. The majority of us, an overwhelming majority of us are Hindus. Tomorrow we say that this country shall be a Hindu country, and should be governed by the Hindu law and that the Muslims should be relegated to the position of second class citizens. Would that be right? Would that be proper? A Parliament may be under the influence of the Hindus on account of certain circumstances that may arise or on account of the excitement of the moment. Can they, therefore, say that India shall not be a secular state, but a religious state? This will be absurd. There are certain things in the fundamental rights which I believe should be sacrosanct.

right or the power of binding and controlling posterity to the end of time". Thomas Paine goes on to say:

Every age and every generation must be as free to act for itself in all cases as the ages in generations which preceded it. The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has a generation the property in generations which are to follow. The Parliament of the people of 1688 or of any other period has no more right to dispose of the people of the present day or to bind or to control them in any shape whatever, than the Parliament or the people of the present day have to dispose or, bind or control those who are to live 100 or a 1000 years hence.

Although Acharya Kripalani was the Chairman of the Fundamental Rights Committee, I give you the explicit words of Dr. Ambedkar, who was really the maker of the Constitution. Dr. Ambedkar said addressing the Constituent Assembly—possibly Acharyaji was then in the Chair and also possibly he has forgotten it:

This Assembly has not only refrained from putting its seal of finality and a seal of infallibility upon the Constitution by denying to the people the right to amend the Constitution as in Canada or by making them amend the Constitution subject to the fulfilment of extraordinary terms and conditions as in America, or in Australia, but we have provided the most facile procedure for amending the Constitution. I challenge any one of the critics of the Constitution to prove that any constituent assembly, anywhere in the world has in the circumstances in which this country finds itself, provided such a facile procedure for the amendment of the Constitution.

Really, Dr. Ambedkar and the makers of the Constitution did not want to say that any part of the Constitution shall be immutable or cannot be changed for ever.

I quote to you Jawaharlal Nehru. This has also been quoted in one of the judgments of the Supreme Court. Jawaharlal Nehru addressing the Constituent Assembly said on November 11, 1948: "And remember this, that while we want this Constitution to be as solid and as permanent a structure as we can make it nevertheless there is no permanence in this Constitution". There should be a certain flexibility and Nehru goes on to say: "If you make anything rigid and permanent you stop a nation's growth. You stop the growth of a living vital organic people. Therefore, it has got to be flexible."

a constituent assembly, provided what we want to do has been kept before the electorate. I do not see any great difficulty in this. When it takes up the question of fundamental rights, it is a constituent assembly; and for the rest of the term it will be Parliament. As a politician I see no difficulty.

I do not propose to go into the merits of the Supreme Court judgments as given before or now. I cannot talk in legal terms as I do not know them. I can talk in the language of the common man. The lawyers may say that I am talking nonsense. I am willing to accept that. I did not want to come to this meeting of specialists. I have been dragged here by my friend Dr. Singhvi. I do not know if I have made my points clear.

**N. C. Chatterjee :** This Convention has been summoned at a very critical juncture but at a very opportune moment. Very important and debatable issues have been raised by the judgments in *Golak Nath's* case and we in Parliament want your assistance and constructive lead. There was no resolution as my friend, Acharya Kripalani said, moved by Mr. Nath Pai. He simply moved a Bill to amend the Constitution. What is that Bill? It contains only one clause. The clause is : Add one sub-clause to article 368 saying "Power of amendment can be exercised in respect of every article in the Constitution". Of course, the point was taken by some Swatantra Members that the Bill was not in order. After arguing at length the Law Minister pointed out that Mr. Nath Pai's Bill does not deal with or take away any fundamental rights, but simply clarifies the position that article 368 contains the power of amendment and it covers every article of the Constitution.

Quite frankly we must take our stand on principles. I am quoting one sentence from a passage from a very important jurist who has said: "An unamendable constitution is a contradiction in terms. The doctrine of the amendability of the constitution is grounded on the doctrine of the sovereignty of the people."

We in Parliament, when we supported Mr. Nath Pai's Bill did not think of the sovereignty of Parliament. We were saying that sovereignty of the people must be associated and that must be kept in check. I know that if you can give us some lead on this topic both myself and all the members of the Joint Committee will be very grateful. Any restriction on the power of amendment of the Constitution impinges upon the sovereignty of the people. In *Golak Nath's* judgment one learned judge of the Supreme Court has quoted a passage from Thomas Paine : "There never did, and there never will, and there never can exist a Parliament of any description of men, or any generation of men in any country possessed of

History shows revolts do take place when the laws fail to keep pace with the changing social conditions and enforcement of the said laws always creates trouble.

Having pointed out the importance of the power of amendment, I only would like to point out whether there is anything in the chapter relating to fundamental rights which should be so sacrosanct as to be beyond the power of amendment. Fundamental rights are rights which the State has chosen to confer on a citizen to enable a smooth and proper functioning of the State organisation and to protect people from injustice and oppression. The object of the Government is to fulfil the obligations cast on them under Part IV of the Constitution. One can visualise that fundamental rights of the individual may operate as an impediment or fetter on the part of a State to fulfil its obligations under Part IV. Any denial of power to amend the fundamental rights in such a situation will lead to economic and social inequalities, which may assume such a proportion as to endanger the Constitution itself. As an illustration, I can point out, in order to improve the economic conditions of the masses of this country, a State may have to resort to nationalisation of banks and nationalization of some industries; may have to resort to abolition of monopolies; may have to resort to acquisition of properties for various social purposes, slum clearance and things like that. And the State will not be in a position to pay all the compensation demanded. In that event unless the right to property guaranteed under article 31 of the Constitution is not suitably amended, it may not be possible for the State to carry out its scheme for social welfare.

Having considered the importance of the power of amending the Constitution and having pointed out that fundamental rights are not as sacrosanct as to be above the power of amendment, I shall analyse the judgment of the Supreme Court in *Golak Nath's* case.

- Before *Golak Nath's* case the Supreme Court had considered this very point in two cases, as Justice Hidayatullah had pointed out, namely *Shankari Prasad's* case and *Sajjan Singh's* case. In *Golak Nath's* case five learned judges—Justice Wanchoo, Justices Bhargava and Mitter agreeing with him, Justices Bachawat and V. Ramaswami concurring separately—held that the power of amendment of the Constitution conferred by article 368 is unqualified and absolute and can cover even the power to amend the fundamental rights. Five learned judges—Chief Justice Subba Rao, Justices Shah, Sikri, Shelat and Vaidyalingam held that article 368 does not cover any power of amendment to the Constitution. It only lays down the procedure for such an amendment. One other learned judge, our distinguished Chairman, Justice Hidayatullah, has pointed out that the fundamental rights are outside the amending process.

In my humble opinion another reason for having a power of amendment in the Constitution is that the amending power operates as a safety valve to enable the Constitution to be adjusted to the changing requirements of the times. As a matter of fact I ought to tell you, I candidly confess that I was the first counsel appearing in the Supreme Court in *Shankari Prasad's* case to argue that this cannot be done and no fundamental rights can be touched. There were many counsels who argued strongly and forcefully to the contrary. My view was overruled by a unanimous Court. I am today convinced that that is the correct view and that should be the law in this country. Any interpretation to the contrary would lead to very great difficulties.

There was a condition in 1947-48, when about 4 millions of people by that time had come away from East Pakistan and a large number of people, over one and half million settled down in the big garden houses near about Calcutta. These garden houses were meant for luxurious villas of the big industrialists or "honest" black-marketeers, whoever they were. But actually they were not being used. These poor people went and settled there. They were shouting for regularisation of squatters' colonies. The Government of West Bengal wanted to regularise and passed a Bill saying that we should give compensation which was payable at the time when these people entered these places but the Calcutta High Court said that compensation must be in that which compensates. Therefore, there must be actual *quid pro quo*. Therefore, one and half million people were in great danger because of the Calcutta High Court's interpretation of article 31 of the Constitution. Compensation means according to English and American law full *quid pro quo*. Mr. Setalvad and myself argued for days before the Supreme Court that that will be destructive and dangerous for nearly two million people who have been completely uprooted, who have been sacrificed at the altar of India's Independence and who have come here in this country under pledges of protection and succour from the Prime Minister and other responsible men of our country. In *Bela Banerjee's* case the Supreme Court negated Mr. Setalvad's and my arguments and said: No. You shall have to pay full market value as compensation. In the circumstances if you say that no fundamental rights can be touched then these beneficent measures would have failed. Therefore, in the larger interest of a large section of the people you have got to touch fundamental rights. In my opinion a situation can arise when as a result of the changing social conditions and changing economic conditions the provisions in the Constitution which were framed under a particular set of conditions may become so unjust as to operate inequitably against the major section of the population forcing them to revolt against such a constitution and demand a new constitution more suited to the changing social conditions.

Justice Subba Rao and other judges who agreed with him, have taken the view that there is no power to amend the fundamental rights at all, Justice Hidayatullah seems to have taken the view that Parliament may make a law for convoking a constituent assembly and that assembly may amend the fundamental rights. With great respect, the objection to this view is that by this process Parliament will be doing indirectly what it cannot do directly and that is not permissible according to the cardinal tenets of constitutional law.

Secondly, I think the constituent assembly established under law made by Parliament would be an 'authority' and, therefore, it would be 'State' within the scope of article 12 of the Constitution. Any amendment made even by the constituent assembly would be equally void under article 13.

I finally agree with Mr. Seervai that it is difficult on principle to understand if a freely elected Parliament cannot be trusted to amend Part III properly, having regard to the exigencies of the socio-economic conditions prevailing in the country, how can a constituent assembly, elected on the same suffrage, do better?

Therefore, the position should be authoritatively clarified. There is no reflection on the judiciary. In my humble submission, there should be a reference to the Supreme Court itself under article 143 of the Constitution for a final and authoritative clarification of the debatable issues as to whether Parliament can amend the fundamental rights. You know after the judgment was delivered, I addressed a letter to the President and when I met him, Dr. Radhakrishnan said: "I am carefully considering your representation and I am thinking whether I should make a reference to the Supreme Court or not". I think that should be done and the final authoritative opinion of the highest court in the country should be obtained so that both the Parliament, especially the members of the Joint Committee, who agree with Mr. Nath Pai's view, would be in a position, unfettered by any further difficulty, to do their duty in this critical hour.

**L. M. Singhvi :** It remains for me now very briefly to propose a hearty vote of thanks to the members of the Presidium Panel.

I am particularly beholden to Justice Hidayatullah who has made it convenient to be here and who has set forth many issues which would be for the consideration of this Convention. I am deeply grateful to Acharya J.B. Kripalani who, as he said, I almost dragged him here. He has been very generous in responding to my personal request to him and he has spoken here with, what I may be permitted to call, a Socratic

That is his view. But he has also pointed out that it can be done by convoking a constituent assembly. The analysis of the various judgments of the Supreme Court in *Golak Nath's* case will show that there is no clear-cut majority for the view expressed by Chief Justice Subba Rao, and really we must have a clarification.

I may point out some of the fallacies in the judgment of Chief Justice Subba Rao, with great respect to his Lordship. In my view, his basic error is that he ignored the well known distinction between constituent power and legislative power. Constituent power is a power which is not subject to any limitations imposed by the Constitution. Legislative power, on the other hand, is always subject to the limitations which are prescribed in the Constitution. The result of locating the power of amendment to the legislative power in article 248, read with Entry 97 in List I, of the Seventh Schedule would be that every amendment to the Constitution would be unconstitutional. That is the fallacy. Legislative power is always subject to the provisions of the Constitution. Any law amending the Constitution under Entry 97, is bound to be inconsistent with the provisions of the Constitution as it stood on the date of the amendment. I agree on some points with Mr. Seervai who in a very thoughtful chapter in his recent book, discussed this case.

I agree with Mr. Seervai, firstly that it is necessary to express the final opinion on the question whether Part III can at all be lawfully amended.

I agree with him, secondly, that the power to amend the Constitution cannot be a residuary power of legislation, contained in Entry 97 in List I.

Thirdly, I agree with him that the significance of article 368 and the great importance of our Federal Constitution and the proviso in that article have been completely overlooked in the judgment of Chief Justice Subba Rao, and the judges who followed him.

Fourthly, Mr. Seervai is of opinion that Chief Justice Subba Rao is mistaken in holding that no Constitution, providing for the amendment, contained a clause like article 13(2). He has shown the Ceylon Constitution's Section 29, sub-section (3). The theory of prospective invalidity means really, as Mr. Setalvad pointed out, that judges can make law in a modern dynamic society. Chief Justice Subba Rao's judgment and the judgment of other judges who supported his Lordship, denied the sovereign people of India and Parliament the right to amend the Constitution. No judiciary can hold up the will of the people. That is what Jawaharlal Nehru said. The judgment of the majority in my humble submission requires careful reconsideration. Whereas Chief

## *First Business Session*

*Subject :* Quality and content of constitutional amendments, the nature of fundamental rights and amendability of the Constitution.

*Chairman :* Mr. A. K. Chanda, M.P.

*Rapporteur :* Professor V. K. N. Menon

**L. M. Singhvi :** I have great pleasure in welcoming all the participants who are present here. True to the custom we must follow yesterday and start in good time. By common consent the discussion yesterday has set the stage for a more detailed discussion in depth on the central issues which were outlined yesterday. I have requested Mr. Chanda, and I am glad that he has agreed, to chair the Presidium Panel for today. Today's discussion should be confined as far as possible to the quality and content of constitutional amendments, the intention of the framers of the Constitution, the status of fundamental right in relation to amendability of the Constitution, particularly in respect of Part III, although it is very difficult to draw a very rigid demarcating line.

**A. K. Chanda :** It is an unusual procedure Dr. Singhvi has adopted in proposing me, a non-lawyer to preside over today's deliberations. My approach to the problem will, therefore, be a layman's approach, a commonsense approach, if I may say so, without getting involved in legal niceties. Our Constitution makes Parliament the continuing constituent Assembly. It has prescribed three different amending processes; a simple majority for amending what are largely transient provisions, though in their wisdom, our Constitution-makers have included the reconstitution of States also in this category. A reorganisation can also be undertaken by a simple majority in Parliament. All other provisions can only be amended by a special majority of two-thirds of the members present and voting, and a majority of the total membership of the House, except those which are considered to be entrenched or federal provisions; these require the concurrence of at least half the number of States in addition.



voice. I am sure his exhortation will remain with us in the deliberations of the Convention.

I am also grateful to Mr. S. K. Das, Mr. M. C. Setalvad, Mr. N.C. Chatterjee and Professor T. K. Tope for having agreed to serve on the Presidium Panel for the opening session.

I would with the permission of the Chair adjourn this session of the Convention until tomorrow, 9-30 a.m.

moral values if we hold on to the retrograde view that these values were unchangeable.

Mr. S. K. Das raised an interesting point, whether the judiciary could take upon itself authority and functions which belong to another organ of the State, the legislature. The legislature makes laws and the judiciary interprets and administers them. As Pandit Pant aptly observed in the Constituent Assembly that the future of the country has to be determined by the collective wisdom of the representatives of the people and not the fiat of the few, who have been elevated to the judiciary.

The idea of convening a constituent assembly by relying upon the residual power of Parliament while denying it the right to amend the Constitution, would lead us to the absurd position that a creature of Parliament would enjoy larger powers than its creator, Parliament itself. Secondly, a constituent assembly would be able to amend or even re-write the Constitution by a simple majority. A single party might well be in a position to muster the majority, even though it may be a precarious majority, to impose its will in remaking the Constitution; whereas Parliament can amend the Constitution only by a special majority. As we know, today no party is in a position to amend the Constitution without the support of one or more of the opposition parties. The question also arises whether the supreme judiciary in India or anywhere else should function as a school teacher, a claim which Justice Harlan of the United States Supreme Court discounted as being inconsistent and improper with the place and position the Supreme Court occupies in the United States' Constitution. Yet, as we all know in the United States, there is judicial supremacy which has been consistently invoked and used to enlarge federal powers through the processes of interpretation. For example, racial integration is sought to be achieved by legislation enacted under the commerce clause which looks perfectly innocuous, but which has been used time and again to amend all kinds of things; including the establishment of the Atomic Energy Commission. Would it be too much for us to expect that judicial reviews in India would be broad in their sweep and would take note of past intentions and further trends in interpreting the Constitution? I should like to limit myself at this stage to these general observations, and if I get the opportunity I may ask for certain clarification before closing the discussions later.

**L. M. Singhvi :** I would now request Professor V. K. N. Menon to open the discussion, particularly with respect to the quality and content of constitutional amendments in the past. I feel that it is only right that while we are discussing fundamental rights and constitutional amendments, we should also examine the record of these constitutional

The question before us is whether the amending powers of Parliament, sitting as a constituent assembly, is all-embracing and bring the fundamental rights also within its reach. Legal niceties apart on which no unanimity has been possible—actually there are sharp differences, and even the Supreme Court has given differing interpretations at different times—we have to consider whether any constitution made anywhere at any time could or should be considered inviolate and immutable. A constitution reflects economic, political and social concepts prevailing at the time it is made. It also provides for the special needs of the community then existing. Our fundamental rights are thus coloured by this concept and provide for these needs. But a constitution does not function only in the environment in which it is made but also centuries later. Therefore, it has to be a live organism, able to respond to the challenge of changing concepts, ideals and ideologies, of social and economic objectives. It thus needs a shot in the arm from time to time. I would even say that to retain its proper image, it needs plastic surgery and remodelling from time to time. If we accept the view that no constitution is immutable; including, of course, the fundamental rights, it would logically follow that the fundamental rights are also not sacrosanct and that our Parliament did not overlook the necessity for amending any provisions in the Constitution. I should imagine that the amending power of Parliament was intended to be clearly comprehensive. If there is a legal lacuna which has come to notice, it must be a drafting error. It may also be an incorrect interpretation of the Constitution violative of its intentions. With great respect to lawyers present here, I should say that it is commonly believed that our Constitution was made by the lawyers for the lawyers; that they have created a paradise for themselves. I do not, of course, subscribe to that view. But at the same time, we must concede that some of the fundamental rights are basic human rights, universally cherished, and they should obviously be made immutable. But Parliament representing the people, I expect, would always so regard them; it would not dilute or dispense with such rights as would impose restraints on freedom to practice and propagate any religion or faith, the freedom of minorities to preserve their distinctive languages and cultures, etc. There are quite a number of such rights which are basic to any constitution anywhere. But if the party in power is placed by the electorate in the position to muster the special majority needed to obliterate the ideals which inspired the constitution or destroy human values, then it must be assumed that it is the will of the people that it should be so. Drastic changes can be brought about as much by democratic processes by elected majorities as by a revolution.

Though Acharya Kripalani threw into the forum of discussion yesterday moral values, may I suggest that we would be perpetuating outmoded

amendments in the past and find out to what extent is the widely shared feeling justified that this power of amendment which was considered to have vested without question at least until *Sajjan Singh's* case, in Parliament, was used indiscriminately or excessively or in a light hearted manner as I mentioned yesterday.

**V. K. N. Menon :** In the discussion arising out of the opinion of the majority of the Supreme Court in the *Golaknath* case the main issue has sometimes tended to be obscured by secondary considerations. The main issue is whether fundamental rights can be affected by a constitutional amendment. Only secondary, however important in themselves, are questions like those of the supremacy of Parliament, the importance of fundamental rights, the principle of prospective overruling, the necessity for a new constituent assembly, even the total number of Supreme Court judges for and against a ruling. It is necessary, therefore, to distinguish between these two kinds of problems, and emphasise that the principal question is whether a constitutional amendment can or cannot abridge fundamental rights. Once this is settled, many others which have been mentioned in this connection will be found to be platitudes, or consequential or irrelevant.

The specific issue is whether the expression of 'law' in article 13(2), (which says that "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void"), includes, or does not include, changes made under article 368 which prescribes the procedure for the amendment of the Constitution. Associated with this issue is the question whether article 368 prescribes only the procedure for amendment and whether the substantive provisions are not like those of articles 245, 246 and 248. The latter deal with the extent of laws made by Parliament and the States, the subject matter of such laws and the residuary powers of legislation.

It is not necessary for the present purpose to repeat what has been said on either side whether in the course of the concerned three Supreme Court judgments, (*Shankari Prasad's* case, 1951, *Sajjan Singh* case, 1955, or the *Golaknath* case, 1967), or since the last, in Parliament and in the Press. It seems to me that a, if not the most, deciding consideration, is that, if fundamental rights were intended by the Constituent Assembly to be incapable of amendment under article 368, not only is it natural to expect that the Constitution would have clearly said so, but in the Constituent Assembly also this would have been pointed out in the course of the debates. The latter does not appear to have been done. Even Dr. Ambedkar, when he moved the draft article dealing with the

in London has not vanished into thin air but became vested in us: i.e., all the people of India as a whole. It has to be ascertained what is best in the common interest of everybody—I say in the common interest because there can never be unanimity on vexed problems like this—and which should be done.

This problem can be seen from a simple point of view. It can also be seen through a magnified lens and you know the capacity of modern science for magnifying. The smallest thing can be magnified, broken into, dissected into threads and debated upon. That is also good, because the ultimate result that will come is by a majority opinion, it is the one that will have to be deemed to be the opinion of the country and the nation. Therefore, the Constitution, which is most important, and which is supposed to be most enduring, almost put on a permanency, has also to be viewed with the changing times. It is being done not only here but all over the world. But we are not concerned with what others are thinking, except for the purpose of stimulating our thought to find out what is best in our interest. It is no use analysing the propriety of the constitution of the Constituent Assembly, or the Provisional Parliament, or whatever it is. We are all persons, citizens, who have sworn loyalty to the country and to the Constitution. Therefore, the Constitution is such an important thing that it should not be lightly interfered with. But that does not mean that on no account should it be interfered with, if interference is necessary, because then it will stand as a block against progress of the country. There should be no hesitation. I will not develop that point because all are agreed that a constitution is an organism and, therefore, is bound to evolve. Amendments can never be denied for all time to come. Therefore, the question reduces itself as to whether, (dissociating at any rate in my mind, I am dissociating myself, from the individualities of the Judges who have decided the case of *Golak Nath*: I am looking basically at the one point)—fundamental rights should remain for all time to come, so long as the Sun and the Moon last, for the whole of eternity like this? Or are they amendable to suit the existing conditions? If they are not amendable to suit the existing conditions what should be done?

I will first of all deal with the position as to whether under the existing Constitution, Part III is amendable or not. In so doing one has to see whether in the course of the debate that took place when the Constitution was framed, these ideas did or did not occur. Or in other words, to put it in the phraseology used by the learned professor, to find out the intention as reflected by our representatives in the Constituent Assembly, which again should be the reflection of the opinion of the people in whom the sovereignty is vested, as to what this Constitution should

'procedure' in the margin of the text of article 368, and, be it noted, only in the margin and not in the text, is also unacceptable.

I would like to add in this connection that, even if we do not accept in India the American practice of looking into the intentions of the authors of an Act, as distinct from the plain meaning of its words, as is the British usage, our Supreme Court has referred to the debates of the Constituent Assembly for the meanings of words in our Constitution; and this has been done also in the cases we are concerned with in this discussion. However, I would not like to limit myself to this judicial principle.

One last consideration I would like to adduce in support of my view regarding the intentions of the Constituent Assembly is that, if they had meant that fundamental rights would be totally unamendable, how can we explain that it was the same body of persons who, in 1951, made the First Amendment, the first one abrogating fundamental rights?

In what I have said so far, I have not referred to many other important points which have to be considered by this Convention. I will only say that I am in general agreement with most of the views which have been expressed here by way of criticism of the majority decision in *Golaknath's* case. It was not my intention to repeat, or even underline, the other points which have been made by eminent persons more learned in the law than myself.

**B. V. Baliga:** At the very outset I feel that we owe a debt of gratitude to the Supreme Court for having pronounced this judgment. It has set people thinking. Save for the judgment coming in the manner that it has done, following the preceding judgments, this aspect would not have been brought into focus in the way it has been done.

The next submission that I would make to this august audience is, professionals that we are—lawyers, legislators, jurists—should remember that we are all citizens of the country and that the interest of the country and the nation should be the sole guiding test and not even the principles of jurisprudence, as they once were, as they are or they are likely to be hereafter. Jurisprudence will have to yield to the needs of the nation. Democracy as it was understood in olden times has changed complexions, and will continue to change so long as human nature imperatively wants it. The law also has to fall in line.

With this background, I would say that the sovereignty, which we did not possess in the olden times, when it came to us after independence, made one thing clear that what was once thought to be in the Parliament

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be. It is needless to cite extracts from the debates here and there, either from Dr. Ambedkar or from Pandit Jawaharlal Nehru or Shri Santhanam or Shri T.T. Krishnamachari or a number of them. One can easily find speeches and extracts which will support the view that it was never thought by anybody that the Constitution should be so rigid as to be beyond the reach altogether for amendment or that it was to be inviolable, transcendal. Therefore, we can take it that the question of amendment of the Constitution did come into the thoughts and debates of the Constituent Assembly.

Coming to the narrower point as to whether the Framers of the Constitution deliberately knowing that there may be power of amendment in Parliament wanted that this particular, limited, small little field of fundamental rights should be kept so inviolate as to be beyond the reach of Parliament under all circumstances. There are plenty of extracts from the Constituent Assembly Debates that it was thought so by some people. The question will be whatever they might have thought, it is one thing to gather intentions and other to find out the interpretation of the Constitution as it is. If the Constitution stands as it is with the limitation of immutability fixed on to it, the pronouncement of the judgment by the Supreme Court is correct; therefore, we have to find out ways of trying to get over it, by amending it in some fashion or by invoking some other powers. In other words, can it be within the four corners of the Constitution as it stands? Or is it necessary to go beyond the four corners of the Constitution as it stands to get our objective, namely, that nothing stands in the way of Parliament changing the Constitution to suit the conditions of the time? If we analyse the contents of the fundamental rights, one thing appears clear that there has been rather a hasty conglomeration, a compilation of joinder of rights which are not on par or of the same quality, and which may be and can be distinguished from some rights which can never be separated from human freedom. Those rights are something different from what might be called the proprietary rights attached to assets which have nothing to do with the freedom of the country unless it be to protect the rights of the nation and the assets of the nation against foreign aggression. But we are dealing with the Constitution so far as the internal Government of the country is concerned. Therefore, the country's internal Government, as is provided in the Constitution, has to see how best it is to be done in the best interests of the nation.

Therefore, I would respectfully submit that there has been a hasty inclusion of proprietary rights in the fundamental rights chapter. There should be no hesitation in our minds in pointing out that what has been done there either willingly, knowingly, or because the Founding Fathers

had to do the biggest task that has ever been accomplished, namely, the framing of the Constitution, was under the circumstances that were then prevailing. At that time they might have thought or might not have thought to make property right a fundamental right. Even if you think that they have deliberately included it in Part III, it is certainly open to the present generation to consider as to whether we should be bound eternally by it or whether we should change it, and if so, to what extent? In that respect, this particular article 31, can be isolated from other fundamental rights. That aspect needs consideration.

If, on the other hand, it is thought that it will be necessary in our interest to retain article 31 in Part III, that will be a different approach altogether. My own view is that with the Constitution as it stands, it will be unnecessary to explore various avenues that have been mentioned. The Constitution being elastic enough does not envisage that every situation could have been precisely provided for to meet any contingency that occur hereafter. It is within human experience that when we begin so many schemes, either the national planning or the construction of a house or others, it is just not possible to have the scheme envisaged precisely. Therefore, we have to take things as they come and if we find today that it is necessary, we should not hesitate to take such steps.

This question does not arise for the first time in the case of *Golak Nath*. This point has also been mooted earlier. What was the aspect which could not have been known earlier and which is suggested for the first time in this case? It may be that it may not have been presented before the Court in the manner in which it has been done in this case. But the question is not that since every thought occurs at a later date that things are to be reviewed and interpreted in the same text. If with all the knowledge that the Judges of the Supreme Court possessed, they decided overruling their earlier two judgments that the Seventeenth Amendment is constitutional, I do not for a moment understand how because this new argument has been advanced—however most efficacious it may be—the Court could lightly interpret and accept it. Even if we analyse opinions given by the Supreme Court in all these three judgments, as Professor Menon pointed out, it may be seen that though there is a divergence of opinion, the preponderance (if you are to go by the number of Judges who have given opinion) of opinion, namely 13 to 6 Judges have spoken in favour of the view which I am canvassing. The public are the final tribunal to say what they want and how they understand their Constitution, what is best in their interest and they are the most incorruptible tribunal. I am not suggesting that other tribunals are open to any kind of pressures. But what I do maintain is that

changing times are better felt by the public because they are in the streets. Either the legislators, or the judges, or even perhaps the learned scholars are not so much in the streets as the common man is. If the common man feels that it is necessary and in his interest, we have to push back our individual considerations.

The question is: Does the power lie with the Parliament or not? If that is not so, where else does it lie? It is vaguely suggested that to the extent of fundamental rights the sovereignty is retained by the people and has not been given to the Parliament.

In this connection I would read only one or two thoughts, not mine, but expressed long long time back, and which remain unquestioned, by Abraham Lincoln in his inaugural address (on March 4, 1861):

At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by the decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

In this connection James Maddison has said:

On any other hypothesis, the delegation of judicial power could annul the authority delegating it, and the concurrence of this department with the others in usurped powers, might subvert forever, and be beyond the possible reach of any rightful remedy the very constitution which all shall have instituted to preserve. Some men look at constitutions with sanctimonious reverence and deem them like the ark of the covenant, too sacred to be touched.

One observation of Pandit Jawaharlal Nehru also needs mention: "No Supreme Court, no judiciary can stand in judgment over the sovereign will of Parliament, representing the will of the entire nation."

Therefore, I submit that Parliament (I am dissociating it from the political party affiliations or the pattern that is prevailing today, but speaking purely from the juristic point, I do maintain and say that Parliament) is supreme and cannot be denied the right to amend the Constitution including fundamental rights.

**D. K. Kunte:** In the discussions that we have had in Parliament, the question was being made out that the majority of the Judges have interpreted the Constitution saying that the fundamental rights could not be amended by the Parliament. This means, as it is, that the

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the case of the widows right to property. Ultimately we find that irrespective of the actual text of the *Smriti*, the legal interpretation given by the courts was to modify the law with a view to answer the changed social situations. So, the real question before us is: Do we want the judges by their judgment, to legislate, or somebody else should legislate and amend the Constitution? That is the real point.

Did the Framers of the Constitution want Judges to amend the Constitution by their judgments? Shri Chanda was pleased to refer to the segregation laws in America. The acts are the same. But the recent interpretations of the U.S. Supreme Court are different; hence desegregation or intermingling of the students in schools came about. In our country, if we look to some of the judgments of the Supreme Court, for example, in the matter of labour legislation, we find that they are progressively reacting to what the public has been wanting. My friend on my left, the Speaker of Mysore, just now made a reference to that. Now I come to the Constitution itself which is supreme and meant for running the Government of the country for the people. The question is whether the Judges should have power to amend the Constitution by interpreting the Constitution or should it be done by someone else. I do not want to go into what the Judges have said in this recent case. Whatever might have been the view point five years back. The Judges of the Supreme Court, while laying down that the fundamental rights could not be abridged or taken away even by amending the Constitution as long as article 13(2) remains in the Constitution, they have said that they are not the persons who have the authority to amend the Constitution. Have they not accepted the position? As I said, six of them have accepted the position. And if a question were to be put to the five under article 143, whether an occasion will arise for amending Part III of the Constitution or not, I am sure they will not say that never an occasion will arise for amending Part III of the Constitution, *i.e.*, the fundamental rights. They could not give a categorical reply in the present case, because we are in a very dynamic world today which can never be static.

The question remains, as to what should be the quality and content of the constitutional amendment. In the case of article 31, it was incorporated in the Constitution with a saving clause that all legislation passed before the Constitution actually came into force (by which time certain States like Maharashtra and others had sufficiently appropriated the feudal rights) shall be protected from the operation of clause 2 of the article. The logic behind that provision was that if what was done then was good for the public in one part of the country, it ought to be good for the public in other parts of the country, whatever be the letter and words of the Constitution. I said, if article 31 could not have been

have tried to touch Part III of the Constitution. I really do not know this. Even in socialist countries, there is a distinction between personal property and private property. Therefore, property has a place in every human being's life whether it is private property or personal property. And if we look at the proceedings of the Constituent Assembly, we will find that if article 31 were not included in that Constitution I really do not know whether the Framers of the Constitution would have come to a consensus between themselves as regards what the position should be. They were not merely philosophising but trying to frame Constitution for the country. Therefore, they were answering a very practical question, and as long as the question of proprietary rights is going to remain there, whether you put it under Part III or anywhere else, it will have a place in the life of the society and of the individual. The feeling is that proprietary right, meaning thereby the individual proprietary rights, have no meaning in the present so-called social standing. What else will we find in this socialist country or a country like Poland? Why did it go from nationalisation, or collectivization of farms to individual property in land? So, therefore, one should remember this: Even if you take the property right out of the fundamental rights chapter, it is going to remain with us.

Acharya Kripalani emphasised moral aspect of the question when he spoke to the august gathering. He was the Chairman of the Fundamental Rights Committee and he tried to tell us that they were intended to be inviolate. He had suffered the emergency and, therefore, the crushing down of Constitution for the last five years. Did he, as Chairman of the Fundamental Rights Committee, then, at all lay down that an emergency morality ought to be more supreme? Really he was only arguing against himself when he talked of preaching morality. Morality is necessary since it sustains us. Morality is a thread which runs in the whole social fabric. If one is a warp, the other is the woof; without that social fabric could not be built. But yet these Framers of the Constitution, of which men like Kripalani were the main framers, they provided for the situation of an emergency and, for reasons best known to themselves, but did not lay down how long that emergency should exist; as a result we have had the emergency, as he said, from 1962 till todate.

And, shall I point to an analogy in India's life? It is not that this is the first time that we have written law in the form of a Constitution. We have the *Śrutis* and the *Smritis*. In the case of *Smritis*, Manu laid down the law. There were others also who laid down the law, but when these *Smritis* became inviolable and unamendable in course of time we find the courts stepping in, and laying down different rulings, for example

It was only 'security of the state'. This omission led to the view that even incitement to offences could not be penalised. This lacuna was cured by an amendment of the Constitution. This was an amendment which did not relate to property right. If *Golak Nath's* case stands, you cannot enlarge the restrictions because if you enlarge the restrictions, you abridge the content of the right, because a right is subject to the restrictions. Therefore, even in respect of basic rights, there must be some means of removing a lacuna. In stating the restrictions on the various rights mentioned in article 19, there may be a lacuna and there must surely be a machinery to cure that lacuna.

The other point on which I wish to make some observations is that in our country various views have been expressed as to where sovereignty lies, legal sovereignty as distinguished from political sovereignty. Some have said that legal sovereignty lies in the people; some have said that legal sovereignty is in Parliament; some have said that legal sovereignty is in the Constitution itself, the Constitution being the supreme law of the land. Now, it seems to me that by adopting the doctrine of prospective overruling the Supreme Court has arrogated to itself law-making authority, in the sense that when Constitution says that a law which is repugnant to a fundamental right is void, the Supreme Court says that it is not void from the beginning but from a particular point of time. This is really exercising legislative authority.

My third observation is that we need not go to the debates in the Constituent Assembly and the various speeches made there, because those respectable gentlemen, who were members of the Constituent Assembly, did not all speak in the same voice, nor did they speak with the same amount of precision. We should go to the Constitution itself to find out the distinction between an exercise of constituent power and an exercise of legislative power. When the Constitution talks of an exercise of legislative power under article 245 it merely says that, subject to the Constitution, you can make laws in respect of this or that subject and so on. It says in effect that when the legislature is making laws it must not run counter to the Constitution. Surely that cannot be the article which gives the legislature power to change the Constitution. Now, contrast article 245 with article 368 and you will see in article 368, there is no mention of 'subject to the Constitution'. It says "any amendment of this Constitution" and later on it says, the Constitution shall stand amended in accordance with the terms of the Bill when it has been assented to by the President. The distinction is clear. It is obvious that in one case it is exercise of ordinary legislative power and in the other case it is an exercise of constituent power. This distinction was brought out very forcefully by Justice Patanjali Sastri in *Shankari Prasad's* case and



incorporated in the Constitution in the way it was worded originally, it was for the reason that there could not have been any consensus on it. By wording the article as it emerged they were trying to get over the difficulty. For the amendments of the Constitution there has to be a two-thirds majority. Even before it comes, the consent of the States has to be obtained. After the Parliament passes the amendment the majority of the States must consent to that. At one stage the States' consent was required before the amendments could come before the Parliament, they had to be sent to the States and their consent obtained. There again, the Parliament has watered down and the Supreme Court in its judgment has said that whatever amendments to the Constitution have been allowed and have been found to be good law in the past, would remain. It is a contradiction in itself. If they say that the Constitution could not be amended because article 13(2) is there, this article is there since January 26, 1950, as such those amendments ought to be thrown over by the Supreme Court. Even though they are interpreters of law, all the same, they are practical human beings. So they have really protected the amendments passed by the Parliament uptil now.

Now coming to the position how we amend the Constitution, I would rather really like to differ from Justice Hidayatullah when he says that a constituent assembly shall be called. In that case amendment would be done by a simple majority. The Framers of the Constitution have laid down that there has to be a two-thirds majority and all that. Therefore, with regard to the amendability of the Constitution as it stands, I will bow down to the judges of the Supreme Court, because they are the persons to interpret the law. But I will further say that as long as there is a necessity to amend it, we might make the conditions of amending more strict. Otherwise, it will be just like the *Vedas* becoming static and then everybody interpreting it in the way he likes. So the choice before us really is, will the judges lay down the law by interpreting the Constitution or there ought to be some other forum?

**S. K. Das:** I propose to intervene briefly on some points only. Even with regard to those basic rights in Part III which, we seem to agree, are basic in the sense that they run with human society, difficulties may arise unless an amendment is permissible. I may point out one such difficulty. Article 19 which deals with freedom of expression gives the right to freedom subject to social control. For example, one cannot be free to defame another. One cannot be free to slander. These are contained in the restriction clause. There was a lacuna in the restriction clause which was pointed out by the Patna High Court. The expression 'public order' did not occur in that restriction clause.

Treasurer of the Institute of Constitutional and Parliamentary Studies and to my good friend Dr. L.M. Singhvi, Executive Chairman of that Institute. They readily agreed to this suggestion and volunteered to organise a Convention themselves, in co-operation with us and other like-minded bodies. We then decided to pool our resources and agreed that while we at the Centre would provide the facilities necessary for the Convention, the Institute of Constitutional and Parliamentary Studies would provide the expertise necessary to prepare the working papers and other voluminous documentation which is before you. In the event I hope you will agree that this collaboration has been eminently fruitful and both the India International Centre and the Institute of Constitutional and Parliamentary Studies can well congratulate themselves on their partnership in an enterprise in which so many eminent men and women are today participating.

The crux of the matter that seems to me is this—to what extent does article 13(2) of our Constitution limit the powers conferred on Parliament by article 368 in Part XX of the Constitution? It is clear from the available documentation bearing on the history of these two articles as well as their marginal headings that it could not be the true 'intention' of the makers of the Constitution to confer that degree of primacy on article 13(2) as the majority judgment in *Golak Nath's* case has done. I venture to suggest that it was no part of the intentions of the makers of the Constitution to interpret article 13(2) as literally as the majority judgment in *Golak Nath's* case has done, and that the principle of harmonious construction must prevail over the principle of grammatical interpretation, specially when two major provisions of any enactment do not accord with each other but make good sense only when read together instinctively. It was said many centuries ago, "*scire leges non hoc est verba eorum tenere sed vim ac potestatem*—Lawyers are to be acquainted with the policies of the law, and when the laws are concerned with economic issues, it is vital for lawyers to appreciate the economic theories and policies underlying them." I might add that this applies equally to laws dealing with political and social issues.

In this connection, I would ask: what precisely is the meaning of the phrase "any law which takes away or abridges the rights conferred in Part III of the Constitution" to which a reference is made in article 13(2). It seems to me that the only true way to interpret rights in this context is to interpret them not merely qualitatively but also quantitatively. Bearing in mind this two dimensional concept of rights, would it be taking away or abridging the rights of a few if in the interest of extending the same rights to many, certain restrictions were to be imposed on their exercise by the few? This is no hypothetical question, for it

later by other judges in *Sajjan Singh's* case. This distinction appears to have been very lightly brushed aside in *Golak Nath's* case.

There has been a suggestion that we should separate article 31 from fundamental rights. In this connection, it has to be remembered that article 31 is not an article dealing entirely with the right to property. It deals mainly with acquisition of property and payment of compensation. To hold property and to dispose of property, comes under article 19 and that right is subject to social control. The trouble is how one can separate article 31 from Part III, unless there is a power of amendment or unless there is a power to call a constituent assembly to redraft or change the Constitution.

It has been stated that the real majority view is of 13 judges, by taking into consideration the earlier decisions, and not of 6 judges. It is no use saying such things, because under article 141 the judgment of the Supreme Court, if declared by even a majority of one, is the law of the land. Therefore, if you want to change that position you will have to go to article 145 and make necessary changes, so that in the cases of this nature the change of a marginal judge would not necessarily tilt the decision one side or the other.

**D. L. Mazumdar:** In intervening at this stage of the debate, I should like to explain briefly the circumstances in which the India International Centre decided to collaborate with the Institute of Constitutional and Parliamentary Studies in organising the present Convention. Within a few days of the delivery of the judgment in *Golak Nath's* case by Chief Justice Subba Rao, some of us thought that the issues raised in the judgment were of such a nature and of so wide a range, transcending as they did the usual limits of statutory interpretation and impinging so heavily, not only on the future development of our constitutional law but also on the course of our political, economic and social developments in the years to come in a manner, that they deserved to be considered at a high-level all-India assembly of not merely jurists and constitutional lawyers but also of all informed students of politics, administration and public affairs generally. In other words, the political and socio-economic issues posed by the judgment were matters which concerned not merely judges and lawyers but also all enlightened citizens of this country. It was in this view that some of us thought that it was necessary to organise a full-dress debate on these at a forum which was not limited to specialists but was open to all those who were interested in the future development of our polity in conformity with the accepted goals of our social and economic politics. I broached this suggestion to several of my friends and colleagues and also to Mr. N. C. Chatterjee,

the discussions which will follow, we deliberately eschew this line of argument and do not let our judgment be influenced by the competing claims of sovereignty or of superior power, but be guided by the true meaning of the provisions of our Constitution relevant to the central theme of this Convention.

**G. C. V. Subba Rao:** With reference to the query of my esteemed friend Mr. Mazumdar whether a quantitative enlargement coupled with a qualitative diminution would meet the challenge of article 13, I would just say one word. Article 13 will have to be applied not with reference to the totality of the rights in Part III, but with reference to each one of those rights. So in regard to each one of the rights, which are enumerated in Part III, we have to see whether it has been taken away or abridged. It is from this point of view, I suppose, that this query may be answered.

The question for consideration is whether a constitutional amendment also would be in the same category as a law or not. This is apparently a very simple question.

There are two views : One propounded in the earlier case (*Shankari Prasad's* case) and one which has been propounded in the latest decision (*Golak Nath's* case). I shall proceed on the assumption that the earlier decision is the correct decision and then see what the consequences would be. There are so many anomalies which have been pointed out by learned judges, with reference to that decision. If we are able to meet them and if we are able to correct them, then we may say that the latter view is wrong and the earlier view is correct. Very briefly I will touch on these points.

The first one was a point noticed by our very first Chief Justice, long before this controversy arose. Justice Kania pointed out in *Gopalan's* case that article 13(2) in our Constitution is superfluous. It is not at all necessary to say that a law which conflicts with fundamental rights would be void, because a law which conflicts with any constitutional right would be void. So where is the need for that. This is superfluous.

If *Shankari Prasad's* case was rightly decided, Chief Justice Kania's observation is also right. But if that is right, this anomaly will be there. If the decision in *Golak Nath's* case is right, then there will be no such anomaly. Article 13(2) is very necessary and it must be there to serve a definite purpose.

Then let me take another anomaly pointed out by Chief Justice Gajendragadkar. He said so far as article 226 is concerned, it can be

has a close bearing on the relations between the provisions of Part III of the Constitution dealing with the 'Fundamental Rights' and Part IV dealing with the 'Directive Principles of State Policy'. In simple words, the question that I am posing is this : If in the interest of the quantitative extension of some of these rights in terms of the Directive Principles of State Policy, it is necessary to impose curbs or restrictions on their intensive enjoyment by the few or in limited areas, would the action of Parliament to give effect to this policy be deemed to be taking away or abridging the rights conferred on Part III of the Constitution? In a sense, if one were to generalise as a philosopher of history, one might well argue that the advance of progressive societies in modern times has been from the intensive enjoyment of rights by a few to an extension of these rights, may be less in depth, over a wider area, wider sections of the population. If this generalisation is broadly correct, shall attempts to give effect to this social policy through legislation be thwarted by interpretations of the constitutional provisions on which clearly two views are generally possible?

If the answer is that we cannot bring about social change of the type that I visualise through an extension of the rights enjoyed by a few to the many except through legislative processes and procedures which will render this attempt extremely difficult if not impossible, I fear we shall be inviting political, economic and social tensions whose dimensions in a developing country, rapidly in transition from tradition to modernity, may well be so widespread and formidable that they may well wreck our Constitution and all our efforts towards planned progress. This is a prospect which must cause all of us, judges, lawyers, jurists, as much as others, equal concern. In the circumstances, I do not think that we should opt for a choice in our interpretation of the relevant constitutional provisions which lands us in this sea of avoidable troubles.

In this context, I would refer in passing to an aspect of the debate on this subject which is essentially diversionary and has little relevance to the central issues under discussion. In our Constitution and the system of parliamentary government based on it, the so-called sovereignty of our democratic republic is shared between the Judiciary, the Legislature and the Executive. Sovereignty in the sense in which the positivist school use this word is, in my view, a matter of conceptualist logic. We should not, therefore, get bogged down in discussions on who is sovereign—the Judiciary or the Parliament. What is important and really matters is the exercise of plenary powers affecting the lives and fortunes of our people. I fear we shall be diverted from this primary concern if we stray into a barren field of debates as to the Rights of Parliament *v.* the Rights of the Judiciary, *i.e.*, the Supreme Court in the present case. I hope, in

All these four anomalies are there and I have read and reread all the judgments which have been given by the five learned judges dissenting in *Golak Nath's* case to see whether they were able to meet any one of these anomalies. I have to say, I have not been able to find anything in those judgments which will meet the anomalies. They have elaborated their own arguments which may be perfectly sound. That is a different point altogether. But so far as these anomalies are concerned, they have not been met by the other judgments.

So the simple question is: In spite of these anomalies are we to conclude that *Shankari Prasad's* case should be treated as authoritative because of the rule of "*stare decisis*"? The principle of "*stare decisis*" was no doubt relied upon before the Supreme Court and the doctrine of prospective over-ruling had been evolved. But I do not wish to dilate on the point.

All that I would say in conclusion is this: If we are not able to meet these very pertinent anomalies, it may be necessary to see whether we will be justified in bringing about an amendment at this stage which will not remove those anomalies. If you want to amend article 368, by all means do so. But do it in such a manner as to remove the antinomies and anomalies which have been pointed out by the learned judges, remembering that the first anomaly was pointed out by the first Chief Justice of India even before any controversy about this matter arose at that time.

**R. V. S. Mani:** The current session, I believe is considering the quality and content of the constitutional amendments, the intention of the Framers of the Constitution and status of the fundamental rights with special reference to their amendability.

I shall refer first of all to the first constitutional amendment. That was passed by the Provisional Parliament in 1951, and the occasion arose for that amendment because certain Malguzari Abolition Acts which were passed by the various States were challenged in the High Courts. In the Patna High Court, the Malguzari Abolition Act was challenged and it was declared null and void, and that matter came up in appeal to the Supreme Court. The U. P. High Court held to the contrary and Madhya Pradesh High Court also held to the contrary. While appeals were preferred from the High Court, certain petitions under article 32 were also filed in the Supreme Court; but before these cases came up for hearing, the first Constitution Amendment Act was passed, adding articles 31(A) and 31(B) to the fundamental rights. Now, I may mention here that article 31(B) added one schedule; that was Schedule IX, in which a number of Acts, namely 8, were clubbed

changed by a constitutional amendment which not only needs a two-thirds majority in Parliament, but also requires ratification by one-half of the States. So far as article 32 is concerned, which is even more important because it is conferring the right of judicial review upon the Supreme Court, it can be changed by a mere two-thirds majority of the Parliament. That is on the basis that *Shankari Prasad's* case is right. So the ratifying resolutions of the State legislatures would be necessary for an amendment of article 226 but no such thing would be necessary in the case of article 32. This is obviously an anomaly. That anomaly would not be there if *Golak Nath's* case is right because article 32 and indeed all the rights in Part III would be in a higher position than article 226. So that anomaly pointed out by Chief Justice Gajendragadkar, would not exist.

Then there is an anomaly pointed out by Chief Justice Subba Rao. Suppose a law is passed today which says that the right of freedom of speech shall not be enjoyed by the citizens of India. Even though it is unanimously passed by Parliament, it will become void. But suppose that very Act is headed in this way—'An Act to amend article 19 of the Constitution' and it contains the same provisions. Even though it is not unanimous, even though it is passed only by a two-thirds majority, it will be regarded as valid. This is the anomaly pointed out by Chief Justice Subba Rao. Assuming *Shankari Prasad's* case is right, a constitutional amendment of this kind would be perfectly valid, but if it is not called a constitutional amendment and is simply worded as a law for the purpose of taking away the right of freedom of speech from the citizens of India, it would not be valid even if it is unanimously passed by Parliament. That he said was an anomaly and we have to consider that.

Then there is another anomaly pointed out by Justice Hidayatullah, the learned Judge who was with the majority in *Golak Nath's* case. He says we have said in Part III that so far as the right conferred by article 32 is concerned, it is a guaranteed right and cannot be suspended except as provided in the Constitution. Suppose this provision is added as a rider to article 368. Suppose it is not in Part III but is shifted to another position in the Constitution, and incorporated in article 368. Then when article 368 says that the provisions relating to article 32 are guaranteed in conjunction with all that preceded in article 368, can we still say that it can be taken away by applying the provisions of article 368? Simply because this provision is in some other part of the Constitution, are we to give it less weight than it would have if inserted in article 368, which after all is only another part of the Constitution itself. This is a very serious anomaly which would exist on the basis that the decision in *Shankari Prasad's* case is right.

up for decision, Chief Justice Gajendragadkar decided it in favour of upholding the principle of *Shankari Prasad's* case. But then it was Mr. Justice Hidayatullah and Mr. Justice Mudholkar who felt a doubt about the correctness of the decision in *Shankari Prasad's* case; and when *Golak Nath's* case came up, whose petition was also initiated by me, naturally there were two different views, and the views had to be resolved. Therefore, the matter was referred to all the judges of the Supreme Court. The Advocate Generals of all the States were given notices. There were a large number of interveners and the matter was argued at length and every point of view was put forth. For two and half months the case was argued and then the case was decided by 6 judges to 5, whereby the majority over-ruled the decision in *Shankari Prasad's* case and held that under article 368, Parliament has no power to amend the Constitution by abridging or abrogating the fundamental rights.

Some of the arguments that I heard Mr. S.K. Das mentioning to you were put before the Court and none of the arguments were missed. If one argument was missed by one advocate it was mentioned by the other advocate. If one point was missed by one of the judges, the other judges would mention it. And the matter was rolled on the Bench very frequently from every point of view. Ultimately the judgment was given by six judges, as you know, and it is not for us to criticise the judgment as right or wrong, because I believe that it is the judgment which has been given after full consideration, and we, as persons dedicated to democracy, should accept the judgment of the Court.

I was on the first point regarding the quality and content of the constitutional amendment. I would tell you that it was because laws after laws were indiscriminately put into a particular Schedule and the Court was told that you cannot enter into the validity of those Acts that this matter came to a head and to a crisis. So far as the intention of the Framers of the Constitution is concerned, now we do have to remember that these fundamental rights are not drawn from other constitutions slavishly. They are rooted in our history. They are rooted in our tradition. They are democratic freedoms. The basis of democracy is to be found in Part III. They are the irreducible minimum of a good life for an individual. If that is so, how can we get rid of them. If supposing we feel that some sort of social object can be carried out only by getting rid of these fundamental rights, should we do so? No. Once again, I want to remind you, what have the judges done? The judges have not said that they are not subject to social control. Well, Chief Justice Subba Rao and all the other judges have repeatedly said that they are subject to social control, each one of them. What they have said is that article 13(2) gives an injunction to the State that you shall not abrogate from



together and article 31(B) said that they shall not be challengeable on the ground of violating the fundamental rights. Therefore they were rendered immune from the challenge under article 82 or article 226. The first Constitution amendment was challenged in the Supreme Court in the case of *Shankari Prasad v. Union of India* and I believe it was Shri P. R. Das who argued the case for the petitioner and the judgment of the Court was delivered by Mr. Justice Patanjali Sastri. He held that under article 368 there was sovereign power of the Parliament, and the Parliament could amend any of the fundamental rights. This being in the nature of a constituent power, he said, it was constitutional law and it was not 'law' within article 13(2) and, therefore, the constitutional amendment was quite valid.

On account of this judgment, the fourth Constitution amendment was also passed. As a result of *Bela Bannerjee's* case, the Parliament found it difficult to reconcile itself with the position that for any acquisition of property full compensation will have to be paid. Payment of full compensation was difficult. Therefore, the fourth amendment provided that the principles of compensation shall be laid down by the Parliament and the adequacy of compensation shall not be questioned and under article 31(B) thirteen more Acts of the Legislatures were clubbed together in the IXth Schedule. That means that these thirteen State Legislative Acts would again be immune from the attack as being violative of fundamental rights.

By the seventeenth amendment of the Constitution that emerged from the Select Committee, 44 more Acts were rendered immune by including them in the IXth Schedule. You will kindly see that the trend that started from the first Constitution amendment was of clubbing together various Acts under Schedule IX of the Constitution, rendering these Acts immune from all attacks by virtue of article 31(B). Acts after Acts were put in a box and it was said that you cannot touch them. If this trend continued tomorrow you can put even the Income-tax Act under Schedule IX. Now, for instance, the Bonus Act has been challenged. Section 37 of the Bonus Act was declared *ultra vires* as unconstitutional delegated legislation. The Bonus Act also can be immunised now and put under Schedule IX. This was obviously a dangerous trend. I am saying it was dangerous, because it was leading to a rule of men and not a rule of law. We were forgetting the fundamental rights altogether. On the contrary the courts were told that they should be blind-folded so far as the fundamental rights were concerned. In other words, there was a crisis of the Constitution. The seventeenth Constitution amendment, therefore, was challenged in the *Sajjan Singh* case and I was responsible for moving the petition. When *Sajjan Singh's* case came

Therefore, you will realize, and none in this Convention can gainsay, when I tell you, that article 52 refuses to be amended. Therefore, there is no amending it at all.

Next, for instance, let us take article 56. It says that the office of the President shall be for five years. Well, you can make it four years, if you will. You can make it 15 years, if you like. Therefore, it becomes amendable. Therefore, the element of amendability or the element of non-amendability has to be gathered from each article by itself. One of the fundamental rights says that untouchability is abolished. Now, can it be amended by saying that it is not abolished? That would put back the clock of the nation. It is unamendable. There can be no question about its amendment. You will thus see, if you examine article after article, that there are certain articles which are absolutely not amendable at all. And when we go to the fundamental rights again we have to examine each article to find out as to what extent it is amendable or if it is amendable at all and then determine how to amend it. You may recall how article 3 was dealt with. There was a question in Parliament regarding the cessation of Berubari Union territory to Pakistan. The question was whether article 3 had to be amended. But this matter was referred to the Supreme Court under article 143, in its advisory jurisdiction, and the Supreme Court was asked the question whether article 3 is amendable; if it is so, whether it could be amended through article 368 or by some other measure? The Supreme Court answered that there was a necessity for amending article 3 and then said that it should be amended by the process of article 368. It was not an easy question to decide whether article 3 should be amended or not and this was a matter for judicial opinion, for a consultative opinion by the Supreme Court. Similarly, I believe we shall have to examine every article to find out whether it is amendable and even today I would like to urge before this august audience, that unless a particular article is amenable to amendment, there is no power of amendment at all.

I am now coming to the last point in our current session, that is to say, the status of a fundamental right with special reference to its amendability. What I would like to say is that the fundamental rights have to be examined by themselves to find out whether they are amendable or not. The omnibus power to be taken under article 368 would again be vulnerable to challenge and any general reference to the Supreme Court under article 143 as has been suggested by Mr. N. C. Chatterjee, I am afraid, would be futile. I would say that if and when an occasion arises, where a particular fundamental right is sought to be amended for some particular purpose of social control, that would be a concrete occasion when we can certainly make a

them. Abridgement or abrogation is prohibited. Well, talking of this Constitution as a rigid constitution or a flexible constitution makes no meaning at all. Our Constitution has not followed any particular pattern. Actually, if you examine the articles of the Constitution, you will find some of them beyond any amendment at all. Of course, I initiated the argument that article 368 of the Constitution does not contain any power, but it only contains the procedure for the amendment. Well, if you examine article 368 itself, you will find that there are three bodies concerned with an amendment: the Parliament, the State Legislatures and the President. You will notice that if an amendment is passed through the Parliament as well as through the State Legislatures, well, there is no time limit fixed in article 368 for the assent of the President. Nor is there any requirement in article 368 that if the President does not assent to the amendment he shall return it to the Parliament. What is the result? The result is that the President is invested with an absolute veto. In the face of this veto, it is impossible for us to conclude that article 368 has the power. It has got only the procedure. As Mr. Justice M. Hidayatullah puts it, it is only when the procedure has been passed through, that it results in an amendment of the Constitution. Then the question arose, where is the power? When I was asked this question by the Court, I did give an answer but it did not find favour with the judges. I said the power to amend any particular article of the Constitution has to be gathered from that article itself. If that article gives the power, by its very terms it is amendable, otherwise it is not. I do still believe and feel that if this answer had been taken by the judges, probably the present criticism about the difficulties of holding a Constituent Assembly or referendum or an opinion poll would not have arisen.

Why did I say so? Let us test the argument by taking particular part of the Constitution. Take for instance, the Preamble itself. We say we are a sovereign democratic republic. Now, what is the power, where is the power to amend this Preamble? Can article 368 be said to contain the power to amend the Preamble? Can we say we are a Communist Democratic Republic or anything of the other type? I am afraid not, unless there is a revolution and we think of a different polity.

Take again article 52. Article 52 tells that there shall be a President of India. Now can I ask you, this question: Can we remove the word 'a' and put in the word 'no', and say: "There shall be *no* President of India?" Can the Parliament under the Constitution have the power to amend it? It refuses to be amended because we see the conspectus of the Constitution. We know that the President is the symbol of the nation and is the apex of our national structure. It is not possible to do away with the President without doing away with our whole national structure.

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reference under article 143 to the Supreme Court, with a query as to whether the procedure adopted under article 368 would be sufficient or some other extraneous machinery will have to be devised for the amendment sought.

**T. K. Tope:** It is said that when the question of the transfer of Berubari Union came up, the Supreme Court was asked whether article 3 can be amended. My impression is that the reference was made to Supreme Court with a query whether legislation under Article 3 would be adequate for the purpose of handing over Berubari Union. It was not a question of amendability of article 3 at all but a question whether legislation under article 3 would be adequate.

There is one more intervention. Well, we have said that there are certain articles that are amenable to amendment, certain others are not amenable to amendment and that is to be found in the article itself. It has also been said that there are certain basic fundamental rights and others which are not basic fundamental rights. I am afraid these observations are not consistent with our Constitution today. The Constitution has not made a distinction between basic and non-basic fundamental rights. The doctrine of preferred freedom that the American Supreme Court has accepted has no place, I am afraid, in our Constitution, though the Supreme Court seems to have a new idea about that. Similarly, who is going to decide whether article 52 is not amendable and article 56 or 57 is amendable? We have to depend upon the Supreme Court for that. Unless we call a constituent assembly and the constituent assembly says that these are the basic articles not subject to amendment the matter would not be free from ambiguity. So, when we make observations, I am afraid that will have to accept the Constitution as a whole and then decide whether we accept an amendment of this article or not. These are the only two points.

**B. R. L. Ayyangar:** The question that is being discussed involves several value judgments about which people honestly differ; including the judges of the Supreme Court. It is a question of interpreting the Constitution, which on all account is intended to ensure balanced stability on one side and flexibility on the other. Just as the rest of the structure of the Constitution is intended to secure stability, similarly the group of fundamental rights are also intended to secure a certain amount of stability. Just as the general structure of the Constitution is not intended to be a straight jacket, similarly the chapter on fundamental rights is not intended to create everlasting vested interests. Now, if we keep this general outlines of the Constitution in mind, perhaps the pivotal point of the controversy which led to the decision can be appreciated better. I may recapitulate two very attractive arguments of Mr. Palkhiwala who

appeared in the same interest as *Golak Nath's*, but for other groups, which ultimately seems to have found favour with the majority of the Court. Mr. Palkhiwala's first proposition was that there is power to amend the Constitution but you cannot make revolutionary changes. It was not his contention that there is no power to amend the Constitution as such.

The second proposition was that the Constitution makers, representing the people, indicated that the fundamental rights should be above change. This is suggested by the manner in which the fundamental rights are put in the Constitution.

The third proposition that, if Parliament unanimously resolves by ordinary legislation to affect any of the fundamental rights, such a law will be struck down under article 13 (2). If the very same Parliament, heading the Bill as a Bill for Constitutional Amendment passes it by a two-thirds majority to affect a fundamental right it does not make any difference, as it is also a law.

I take the first proposition. It at once illustrates the kind of a value judgment that was projected, very attractively and persuasively, and that led to the ultimate decision. Similarly, the correlation between *directive principles and fundamental rights* is a continuous see-saw battle of value judgments. Chief Justice Subba Rao, so far as he said that the happiness and progress of the country should be brought about in the way he suggested in the *Golak Nath* judgment, took to pronouncing a big value judgment as he thought fit. The whole question is that if the Preamble, which Mr. Mani says is not amendable and that we are a sovereign democratic republic, is to be relied upon should then the interpretation of this Constitution proceed upon the footing that sovereignty is denied to the representatives of the people and upon a mistrust of majority rule? If this is how you interpret the Preamble, it would mean that the Constitution makers felt that there is sovereignty but it is not to be in the representatives of the people; and that ours is a democratic republic, but there is no trust in the majority rule and somebody else is installed to defend and protect the Constitution. If this is so the majority judgment is right. If this is not so, I am afraid the majority judgment has this contradiction that it results in denying sovereignty to the elected representatives and that it proceeds on a permanent mistrust of majority rule.

**Piloo Mody:** We have heard quite a few legal pundits this morning, amongst others, and I find that a matter like this cannot possibly be resolved by asking legal opinions. I think that we might take a bit of excellent advice that Justice Holmes gave once that "we must

think things and not words". I am sure that once we have thought out what we want in this country, what it should be, what the structure of our society should be, we can find an adequate number of legal pundits who will then frame our thoughts into words. A matter like this requires a certain basic understanding. It requires us to think about what are the origins of power.

What are the origins of power? It has been universally recognised that power originates from the people. This is a fundamental and basic belief. It is based on an original premise that the people are sovereign and that the origins of power lie with the people. This is the only moral justification of any free society. Our very existence, as a nation requires moral justification, not merely based on power or our capacity to protect our territorial integrity but derived from moral law. I will agree with Mr. Ayyangar that this is a value judgment but it is a fundamental value judgment, because without applying this value judgment it would be impossible to refer to ourselves as a democracy, the morality of it being that we are a free people with certain sovereign rights, rights that we enjoy, subject to no one, not even our elected representatives in Parliament. If we do not accept this original concept of democracy, we have no justification as a nation, and any foreign agency would have the right based on pure power or brute force to enslave us, as we have surrendered our sovereign rights as people to majority rule, or the rule of force, in short, to a jungle society based on the principle that might is a right.

Why is it that we fought before 1947 that we should be free? What right did we have to ask for our freedom? Not because we were strong, but because we believed that there was a certain right of self-determination; because we believed that we were a free people. That is why we had the moral justification for asking that we should be a free people.

And what did in fact happen? In 1947, on the 14th August, all the power in this country had resided in England, in Whitehall, except what they out of their charity or their good nature gave to us to operate ourselves. On the 15th August, when we became a free nation that power was transferred to this country—not to the country, not to any Government, not even to Jawaharlal Nehru, or to Mahatma Gandhi, but it was transferred to the people of this country—we, the people of India.

And what did we do? We got ourselves busy and we framed a Constitution. Why? Because we wanted to establish a society. And in that Constitution, we voluntarily, that is each one of us—I do not know how many of us there were: 330 million or something—gave up some part of the absolute powers that we inherited from the British voluntarily into an institution which we call the Government, the judiciary or the



executive. But we did not give up all the powers that were vested in us. We only gave up that part of the power which made it possible for us to form a society. The balance of the power we retained for ourselves and that balance of the power we retained as adumbrated in Part III of the Constitution which are called fundamental rights. This is the logic of the situation. Those powers were never given up and, therefore, it is wrong to assume that anybody, whether it is elected representatives or otherwise, have a right to change those or alter those except by the explicit and individual consent of each one of us. This is the attitude that I take.

What is it that makes fundamental rights fundamental? It is precisely that these were not given up. These were retained powers. Now what are they? Article 19 lists some of them. Can it be argued that any one of these powers, even 2,000 years from now, shall be obsolete or old-fashioned and will not conform to a "dynamic society" or a "changing society", or that they are in the interests or in the vested interests of certain individuals?

Is freedom of speech and expression a thing that will become old fashioned? Is assembly peaceably and without arms, old fashioned? Or to form associations, or unions, or move freely or settle in any part of the country old fashioned? Or to acquire, to hold and dispose of property, or practice any profession, occupation, trade or business,—can these ever become old-fashioned or out of date? And yet it has been argued particularly from one point of view, namely, that this power to hold and dispose of property does not conform to a changing society. Mr. Justice Hidayatullah in his concurring but separate judgment says very clearly that this is perhaps the weakest of the rights that have been left with the people. But consider these rights as a whole. I might even agree with him. But even the right of property in this country, as it stands, is not absolute. It has never been argued anywhere that these are against one's right to hold property. It is merely the right that is important. You take away the right and what have you got? There should be restriction on property but if you take the actual right away, the other rights become inoperable. Can you have freedom of speech or expression if you take away property rights? If the press in this country is controlled completely and nobody can own a press, or own a newspaper, would you say that your right has not been affected? So to talk about property rights in terms of social change is one thing, and to say that property right itself is a weak right and, therefore, should not be there altogether, is quite another.

I think it was Mr. S.K. Das who said that because there is a lacuna about rights: that several rights like libel and things like that—that it was

necessary to abridge such rights. I think that he looked at it from the wrong point of view. He looked at it as an abridgement of rights. I consider it as a protection of the right of the other individual. In other words each right has its own limitation and that limitation always is that it should not in any way infringe on the right of another human being. This is the basic attitude that one must have towards rights.

Now, is the Constitution adequate therefore? I do not want to say very much more except that I would like to read Mr. Justice Hidayatullah's conclusion which, I think, sums up the position about the Constitution and the operability point within the Constitution very adequately. In his historic judgment he says:

Our liberal Constitution has given to the individual all that he should have: freedom of speech, of association, of assembly, of religion, of emotion and promotion; of property and trade and profession. In addition, it has made the State incapable of abridging or taking away these rights to the extent guaranteed and it has itself shown how far the enjoyment of those rights can be curtailed. It has given a guaranteed right to the person affected to move the Court. The guarantee is worthless if the rights are capable of being taken away. This makes our Constitution unique.

I think these are perhaps the most significant words said on our Constitution and I will conclude by saying that I resent very much people who try to belittle the Constitution and the Constituent Assembly particularly, because they feel that since the Constituent Assembly was *not elected by popular vote or by adult franchise, that it was not representative of the people*. I think I reject this idea that getting votes is the ultimate wisdom and that majority rule is the ultimate law. This is a sort of simple logic, inconsistent with any concept of democracy. I would like to end by saying, if you are serious in your opinion that Parliament can tamper with fundamental rights, then the only way you can do it is to abrogate the Constitution, make yourself a new one and then call yourself a parliamentary dictatorship.

**A. S. R. Chari:** I believe that no branch of the law is so much closely linked with the life and history of a people as constitutional law; and it is from this point of view that I do not agree with Mr. Mani, who made a fervent appeal that we should not subject the majority judgment in *Golak Nath's* case to any criticism of the judges, because after all the judges gave the judgment according to the best of their own lights.

*The main problem, however, is this. I believe that in dealing with fundamental rights or with the Constitution, the main question has to be*

viewed from the constitutional history of a people. Mr. Mani said that certain articles of the Constitution do not lend themselves to amendment and certain articles do. I verily believe that this is purely a subjective approach. I do not see why the article which says there shall be a President of India, which he says is unamendable, should not be amended to the effect that there shall be three persons who would constitute a collective presidium for India. I cannot for the life of me see how it is not amendable from that point of view. But he chose an illustration to which he thought everyone would subscribe. He said the amendment may be that there shall be no President of India and, therefore, he concluded that the article is not amendable. This only illustrates that in the question of approach, we must, as far as possible, avoid what may be considered the approach of individual predeliction, individual bias, individual prejudice, and look at it from the point of view of the right of the people to amend the Constitution so as to subserve their interests.

The first proposition I want to make is that fundamental rights, whenever and wherever they may appear, they always arise as a result of popular struggles and it is this which impresses upon the fundamental rights their special character both the nature of the rights that are considered fundamental, the extent of those rights which are guaranteed at that particular time, and things like that. I do not think it is necessary to go into greater detail, but it is very obvious that one of the most fundamental rights document known to the British Constitution is the "Magna Carta," where the feudal barons fought against King John and the right to life and liberty to be protected and not to be taken away, except by the law of the land and the judgment of his Peers was the right restricted to free men, not to the villeins and serfs. The American Constitution as it first emerged, as we all know, did not have the Bill of Rights but it had a certain curious provision. It said that a slave who has run away and is then caught, shall be taken and delivered to the master whose property he is; which only indicates that the fundamental rights are not some kind of metaphysical absolute jumping from the skies, nor do they arise like Minervas from the heads of legislative Jupiters. They are part and parcel of the struggle of a people, the contending classes participating in that struggle and the level of consciousness of those classes. All these determine what rights are fundamental at a particular stage. This obviously means that rights which were regarded as fundamental once may cease to be regarded as fundamental after efflux of time and changes in the life of the people. Rights which were not regarded as fundamental at a particular time, may come to be regarded as fundamental at a later stage. For instance, we are aware that in many constitutions of other countries, the right to

work is a fundamental right just as the right to property is in other constitutions. Therefore, our Constitution makers, being aware of our popular struggles, in which most of workers and peasants participated had, long before the making of the Constitution, themselves laid down certain fundamental rights, like the Karachi Resolution on fundamental rights of workers, like the Faizpur Resolution with respect to fundamental rights of peasants, namely that the tiller shall own the land. These are all rights which were recognised in the process of struggle in order to see that the classes which fought may each have their particular content given to the concept of freedom. That is why we find that in our Constitution, along with Part III, which deals with what may be classed conventional fundamental rights, which are found in various constitutions, Part IV, directive principles, declared that the rights enumerated therein though they may not be justiciable, are nevertheless fundamental for the governance of the country. Those are the words that you will find. Therefore the question arises, what is fundamental? Is it something sacrosanct? Is it something sacred and holy which you cannot touch? Fundamental only means the simple and the most general rights. That is what is fundamental and it is from this point of view that we must approach the whole question.

My view is that the majority judgment in *Golak Nath's* case fell a prey to what may be described as panic at the imagined prospect of a majority in the Parliament thoughtlessly doing away with the fundamental rights of the people. I do not think such a distrust of Parliament, however unsavoury some of the incidents in Parliament may be, such a wholesale distrust of Parliament which comprises the elected representatives of the people is either justified or could be made the basis of an approach to or interpretation of the Constitution. It may be that at a particular time a Parliament may be hasty, it may be ill advised, it may be thoughtless. But the Parliament is always subject to the control of the people even if it be that for four or five years you may find that there is no remedy. But there will be a remedy always at the hands of the people. Therefore, my opinion is that the majority judgment in *Golak Nath's* case fell a prey to this fear and thus interpreted the Constitution as if the fundamental rights were bars and fetters and almost, as if, it was a prison for posterity. Suppose we find that we cannot ensure a particular living wage to workers unless the right to property in a certain way is curtailed, then it is said you have got to go back to the people. Then the question arises, under what power do you go back to the people? The Constitution does not provide for another constituent assembly. A mid-term election is no answer. Therefore, all these questions, complicated questions, arise, in my opinion, because of the basically erroneous approach.

The approach should be that undoubtedly certain rights are fundamental in the sense that they are most simple and most general and you must look at those rights in conjunction with the Directive Principles of State Policy which says concentration of capital, production and all these things in fewer hands will be to the detriment of the public and shall be prevented as far as possible by the State. It may very well be that the State organizations and institutions find that a particular abridgement of the fundamental rights to hold property may be necessary in order to carry out the purposes of the directive principles. The doctrine of harmonious construction is imminently called for while dealing with the fundamental rights chapter and directive principles chapter. That is so far as the judgment of *Golak Nath's* case is concerned.

My own impression is that the provision for amendment of the Constitution, namely, two-thirds majority with the concurrence of the State Assemblies is a sufficient guarantee against thoughtless amendments of the Constitution or any whimsical abridgement of fundamental rights or the vagaries and caprice of a particular majority which may be temporary in a particular Parliament. That fear does not have any basis at all in view of the provisions in the Constitution itself.

That brings me to the last part. There are various suggestions. For instance, it is said that article 13 was absolutely unnecessary and that it was put there purely as a kind of abundant caution. I think if we remember that the Constitution was made by a people whose past was slavery, whose present was freedom and whose future was to be based on social justice, if we keep these three concepts in mind, I think the position will be quite clear. Article 13 says that any existing law, in so far as it abridges or is repugnant to fundamental rights laid down in the Constitution shall be void; meaning that on January 26, 1950, midnight, a particular provision, like the Emergency Press Act and various other oppressive legislations which affect the rights of the people would be void. From that day, that particular anti-people oppressive law would cease to be in force. That is the position, and I think it is quite erroneous to conclude that article 13 is unnecessary. It was put there for a very good purpose. It is to prevent past laws which are oppressive from continuing in operation after India became free and sovereign and it is also to prevent any vagaries of Parliament, which may on one day pass one law, another day pass another law repugnant to fundamental rights, without resorting to the procedure for constitutional amendment. There is a specific procedure, a well-known legal procedure, for changing the Constitution.

I am, therefore, of the opinion that it is a very good thing that this 'Convention was organised' because I do not believe that the wisdom of

judges is a cloistered virtue. It must submit to the criticism of people, rude criticism even though it may be, but nonetheless criticism based upon the consciousness of the existing citizens in India and, therefore, point the way to such remedy and such amendments as may be necessary.

I am wholly in favour of the proposition that the Constitution of India provides for the concurrence of Parliament and the State Assemblies as a special procedure for making the constitutional amendment. I have no doubt that our Parliament and the Legislatures will be wise enough to make amendments only where they find it is absolutely necessary in order to see that social progress may take place. If they do something which is unnecessary for social progress, then the people of this country have sufficient power in their hands to be able to remedy that state of affairs.

**S. S. Khera:** The very first thing I would like to say is to compliment the organizers on the extremely full and valuable documentation which have been circulated before the Convention. I am sure, the others, like myself, who have read it with some care, have found it very rewarding. Here we have in one place, may I say, everything that could be said upon the judgments. The present discussion is on the judgments themselves. It is largely a matter of choice as to which of these various points that have been put in the working paper are going to be stressed by different individuals. I will, therefore, like to compliment you, Sir, and your organizers.

I believe that we should take our position from what I think is a fact that Chief Justice Subba Rao's judgment is today the law of the land. There is no getting away from that. Since it is the law of the land, the only thing which I am able to add to the valuable list of points made are two fatal flaws which I find in those judgments.

As a citizen, I need a certain degree of certainty about the laws which apply to me. This judgment renders the situation completely uncertain, uncertain at present, uncertain in prospect. The nearest parallel I can think of is the concept which prevails in certain Communist States that everything is right, perfect and balanced at one point of time and at a subsequent point of time all that is considered wrong and abolished and something new is devised. I feel for our country, for our society, that is not merely bad, that is dangerous. There must be a modicum of certainty in the law.

The second flaw I find has been stressed by previous speakers and here I am very much on similar ground as Mr. Kunte. There is a fatal

internal contradiction in the judgment, quite apart from its merits. The judges plead for immutability of fundamental rights, but towards the end of their judgment, the majority recognises the need of some method for changing, and I believe, if one did a psychological analysis of this, here were these unfortunate judges suddenly confronted with a Frankenstein monster they had thought of, brought up, or argued up, and something which neither they, nor Parliament nor the nation could live with. Therefore, it seems to me that they produced a sort of last-minute escape, away from this monster, by saying, well, the Constitution is changeable, can be changed, but not in the way you think it can be changed. You must think of these ways. And if I may submit, with the greatest respect to Chief Justice Subba Rao and the majority, it is difficult to find anything more amateurish than the suggestions which have been made. They are sort of off the cuff suggestions which are thrown off without any due thought. There is no analysis of them. There is no working out of the consequences. There is no working out of the details of the method as to what it implies. I would submit that every single one of the suggestions that they have made is impracticable; I leave the legality out of it. It is simply impracticable. Therefore, we come back to finding a different way. I think the way is already available to us.

What is my concern, as a citizen? I am concerned with my security. Therefore, I welcome a statement of fundamental laws which preserve to me my security. But I have an equal concern with the need for reform and for progress. Unless there is reform and progress, my children will not be further ahead than I am. And the children of the poverty-struck today will be a little further back in the next generation than they are today. Therefore, I feel, and when I say the citizen, I do not mean my concern. I mean the concern of 550 million people with the need for progress. It is equally true for recognition of the need to meet emergencies. What do you do? We in this country have escaped conscription. We are very fortunate. Conscription—leave alone fundamental rights about property—takes people of certain age groups and sends them to be shot. That is an invasion of a fundamental right but has to be undertaken. If we were attacked, if we came under an emergency situation where the national security was so gravely imperilled, *I submit that we would have conscription in this country.* How would we bring that about? Would the Supreme Court be the judge as to whether there should be conscription or not? I submit—No.

Thirdly, I submit that what we have before us is a political, social and not a juridical problem. I have listened to the very able juridical arguments which have been propounded. Mr. S. K. Das exonerated Mr. N. C. Chatterjee, for changing from one position to the opposite

by pleading that as an Advocate for the party, he had to make the best of his case in the Court. But Mr. Mani has done the exact opposite. He stuck to his grounds being obviously convinced of it. Therefore, I do not allow such a simple escape to people who change their minds.

**L. M. Singhvi :** If a person has changed his mind, it also means that he has been very open-minded.

**S. S. Khera:** Yes, and I should say, showing growing wisdom. It is an explanation which I welcome and expect because one welcomes advance in the human mind. But I am against the proposition that to try and resolve a contradiction, as a very brilliant ex-judge of the Supreme Court said, the lawyer is bound to plead differently in different places.

Now, coming back to our problem as a social and political one, and not a juridical one, I would submit that the Parliament, as we have constituted it, as we have just elected it, is the mode of expression of the people's will. It is the principal mode of expression of our will. It is also our principal instrument for social change. We really have no other principal agencies, tools and instruments except Parliament and the Legislatures. We have others too—gheraos, and the barricades and the rest of it, by all means. But these are the principal constitutional ways. I think that the people should not and cannot place themselves and their future generations as Wards of the Court, rendering to the protector, the Supreme Court, the responsibility for looking after our interests. I do not require the Supreme Court to look after our interests. I shall hold my member of Parliament responsible for looking after my rights because I elect him. One of the most dangerous situations which can, however, occur is when the Legislature begins to doubt itself, the quality of its own. Then there is no other way except revolution.

I think that these value judgments should never be placed beyond the people's own power to change and through their mode of influence. It is Parliament that we can influence and put pressures on. You cannot put pressure on, or influence a court of law. It is away from this.

I have a couple of questions and comments to leave my discussion with. May I ask the Convention to ponder as to what would have happened in 1950-51 if at that time the Supreme Court had struck down article 31(A). I submit that something would have given way. The social change would have occurred, a way would have been found, the Constitution would have been amended, and Supreme Court or no Supreme Court, we would have had the social and economic reforms which the circumstances compelled.



Secondly, it is very interesting to find as to the trend of alignment of views on this issue that is before us today. I have prepared statistics on this, and I find that we are getting sharply divided into two brackets. The conservatives stand committed to rely on the protection of the Supreme Court. The radicals, Shri Chari and others, tend more and more to rely upon other measures, which is Parliament. I think that it is dangerous to place our future and our safety in the hands of a small group of people. The judiciary in India is a pyramidal structure, with a group of few men at the top, wielding that particular piece of sovereignty. I think it is an advantage, and it is good to keep the power dispersed. I can think of no other way under our Constitution and our way of life, than to disperse it among all these Legislatures—at the Centre and in the States. At least here is something where the people can make themselves heard, directly or indirectly.

With that, I think I have little to say except to utter a warning that Hitler was not the product of a revolution. He used these processes and never had any trouble with the judicial process under his regime, nor with the judges which he constituted.

**L. M. Singhvi:** May I draw the attention of the Convention to a paper submitted to the Convention by Mr. Mohan Kumaramangalam. He is unfortunately not present here but he has made a point which might also be taken into consideration, namely, the juxtaposition of the fundamental rights and the Directive Principles of State Policy. That of course, in one way or the other we have been discussing already, but I briefly draw your attention to something that has been mentioned in Mr. Mohan Kumaramangalam's paper. He has pointed out the problem of what happens when two parts of the Constitution came into conflict, namely, in attempting to implement the directive principles in Part IV; the law made by Parliament came into conflict with Part III. His answer is avoid the problem. Quoting from Chief Justice Subba Rao's judgment:

It will, therefore, be seen that fundamental rights are given a transcendental position under our Constitution and are kept beyond the reach of Parliament. At the same time Parts III and IV constituted an integrated scheme, are made so elastic that all the Directive Principles of State Policy can reasonably be enforced without taking away or abridging the fundamental rights.

He goes on to point out:

But this approach of Subba Rao, C. J., with all respect, is an approach of evasion. I say this because the history of the last 17 years of the working of the Constitution provides not a few examples of the directive principles and the fundamental rights coming into conflict one with the other.

Then he cites a number of cases and also cites a number of constitutional amendments which, according to him, were necessitated because the Supreme Court gave a superior position to fundamental rights and not an unequal measure of attention to the Directive Principles of State Policy. He goes on to say this:

Thus each one of these different amendments can be seen to have been brought about because the Court's interpretation of the scope of articles 31 and 31(A) stood in the way of enactment of laws necessary for India's economic development, as envisaged by Parliament. Subba Rao, C.J. may have thought that Parliament's view on the socio-economic reform that was necessary for India's further economic progress was erroneous, but that surely was not a matter that came within the scope of judicial review or discussion but was essentially political.

I mention this particularly because he has here discussed the question of Directive Principles of State Policy as conceived in Part IV of the Constitution and said that this conflict has to be resolved. In effect, I think, if I may be permitted to interpret his paper, he says that the Directive Principles of State Policy, though are not justiciable, but they are as fundamental as the fundamental rights are.

I am throwing this into the discussion so that this can also be taken into consideration.

**V. G. Ramachandran:** The discussion has been with a stress on progressive expansion of rights and duties. This progress can be achieved even within the ambit of Part III and Part IV of the Constitution which are as it were, the conscience of the Constitution. There is no need at all for any amending power over Part III. This was in fact visualised by the founding fathers of the Constitution and they conceived the rights in Part III as permanent and sacrosanct. Jawaharlal Nehru on April 4, 1947 while proposing the adoption of the Interim Report on Fundamental Rights stated:

A fundamental right should be looked upon *not from the point of view of any particular difficulty of the moment but as something that you want to make permanent in the Constitution.*

Mr. J. B. Kripalani, while presenting the report as the Chairman of Fundamental Rights Committee adverted to the fact that the rights in Part III cannot be restricted except in the manner envisaged therein in public interest. Mr. Kripalani's paper in this Convention sticks on to this view and he further stuck to the moral aspect of keeping the rights in tact.

The object of keeping these rights in tact had been well stated as early as in 1928 by Pandit Motilal Nehru in his Report to the Congress this wise:

It is obvious that our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal in a manner under any circumstances. Another reason why great importance to a declaration of the rights is the unfortunate existence of communal differences in the country. Certain safeguards are necessary to create and establish a sense of security among those who look upon each other with distrust and suspicion. We would not better secure the full enjoyment of religious and communal rights to all communities than by including them amongst the basic principles of the Constitution.

This basic concept always was the stabiliser of Indian society from the days of Queen Victoria who by her great proclamation assured to the diverse communities in India their minority rights. As Granville Austin says in his book, *Indian Constitution—Corner Stone of a Nation*, "the case of the commitment to the social revolution lies in Part III and Part IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution...India was a land of communities of minorities, racial, religious, linguistic and caste. For India to become a State these minorities had to agree to be governed both at the Centre and Provinces, by fellow Indian members perhaps of another minority..."

The pacification of all minorities into a sense of security against possible tyranny of another minority or majority in power, is the key stone of Part III of the Constitution. To disturb this will lead to revolution. There will be no revolution if Part III is treated as in *Golak Nath's* case as unamendable. For all the germs of progress are contained in Part IV, the Directive Principles of State Policy, on which basis all progressive legislations can be drafted within the restrictive clauses contained in Part III. Part III is really a chapter of restrictions than of mere rights. The mistake lies in resorting to amendment of the Constitution where easily a statute within the ambit of the restrictive clauses of Part III can suffice. Our legislative drafting must perfect itself in this manner and not resort to amendments galore. The *Shankari Prasad's* decision was the first error which led to this drafting lethargy, on the statute pattern instead of the easy devise of amendment. We had 21 amendments and a long list of Statutes, in the Ninth Schedule. This would have gone on but for the majority decision in *Golak Nath's* case. The majority opinion only attempts to salvage what is left in Part III as rights. It leaves in tact all the amendments and prohibits any further whittling

down of the rights in the future. It does not prohibit enlargement or clarification of rights in which sphere the principles in Part IV can well be brought in.

It is said property rights should have been outside Part III. But you cannot ignore the fact that it is in Part III and our founding fathers deliberately put it in Part III. If you ask by a referendum the people in whom ultimate sovereignty rests, as to whether they will like property rights to be no more fundamental the answer will be a clear 'No.' We must not confuse a section of urban sophisticated opinion with the opinion of the millions of the people in the countryside.

**Gurmukh Nihal Singh:** I speak today as a student and an old teacher of Political Science. I do not lay any claims to be a jurist and shall not, therefore, enter into any discussion of the juristic aspects of the question. I would only say in this connection that I agree with those judges of the Supreme Court, who do not put 'a restrictive interpretation' on any provision in our Constitution but who give a more liberal interpretation and take a dynamic view and also take into consideration the changing nature and needs of society. I believe that both 'law' and 'society' are dynamic and not static. Those who take a static view and would like to make the Constitution rigid and who make no adequate allowance for changed conditions, are unwittingly promoting the cause of revolution. As has been well said about the British Constitution—"it bends but does not break."

I hold firmly that the Indian Constitution is modelled on the British Constitution and the Indian system of Government is of the British Parliamentary type, which prevails not only in countries with unitary constitutions but also with federal constitutions, as in Australia and Canada. We have in this country a 'representative' form of democracy and our Constitution does not make any provision for, what are known as, 'devices of direct democracy'—*viz.*, Referendum, Initiative and Recall. Our Parliament sits in two capacities—*i.e.*, Constituent and Legislative, as the Constituent Assembly had done. The Constitution lays down procedure both for amending the Constitution as well as for making and changing laws. After the Constitution has been changed in accordance with the procedure laid down in article 368 of the Constitution it is the amended Constitution which becomes the "Indian Constitution" and not the Constitution as framed originally by the Constituent Assembly. Some 21 amendments have already been made by Parliament in the Constitution during the last 16 years or so. It is necessary to emphasize that no other body, not even the voters directly, have been given the authority to amend the Constitution. The Parliament alone has the authority to do

so in accordance with the procedure laid down in article 368, which divides the provisions of the Constitution into three categories for purpose of amendment.

There has been a good deal of talk about 'the people'. For our purpose, what is meant really is 'the voters' or those persons who have the franchise. The Constituent Assembly framed the Constitution in the name of the people—"We, the people", as the Preamble begins. But then the Constituent Assembly represented a comparatively smaller number of persons, who possessed certain property, educational and other qualifications. It was also elected on the basis of communal representation although only three specific communities were recognised—the General (Hindus and others, including the Scheduled Castes, nationalist Muslims and nationalist Sikhs—i.e., Congressmen), the Muslims (mainly representing the All India Muslim League) and the Sikhs. Of course since the Constitution of India came into force, we have had universal adult franchise and the number of voters or those who possess the franchise has gone up considerably. However, at any specific period of time it is the Parliament that represents and speaks on behalf of the 'people'.

So far as article 368 is concerned, it is complete in itself. There is no article or provision in the Constitution excluded from its purview. It is true, that there are persons who hold that there are certain "Fundamental Rights" "immutable", "inviolable" and, therefore, not subject to amendment, although they have been previously amended by Parliament, in accordance with the procedure laid down in article 368, and, before, 1966, accepted as valid by the Supreme Court. The article containing the procedure for amendment does not contain any words, which would indicate that Part III of the Constitution, containing fundamental rights, is excluded from its purview.

The present Parliament, elected in February 1967, when the Chief Justice K. Subba Rao was delivering his judgment, is fully representative and is as competent to amend any part or provision of the Constitution as were the previous Parliaments and the Constituent Assembly. Of course, every Parliament or Assembly, as pointed out long ago by Prof. Dicey, is subject to internal and external limitations. The composition of Parliament at any particular time imposes the internal limitation; for instance, the present Parliament cannot make amendments as easily as the previous three Parliaments could do, on account of the party-position in the two Houses of Parliament and the State legislatures. Similarly, the composition of the Indian Constituent Assembly represented the 'people', i.e., persons who had the franchise and those who elected them and the public opinion prevailing at the time (1946-50), when the Constitution was drafted. Today amendments to the Constitution do not

depend on the policy or whims of the Congress. The views of the Parliament and of the judges of the Supreme Court may or may not coincide. Whenever the interpretation of a law or constitutional amendment differs from the intentions of Parliament and a particular provision is held invalid, the Parliament, if it considers necessary, can and has been amending the law, the amendment or any particular provision in such a manner as not to attract the objection of the Supreme Court. This has happened several times in the past. The law-making function and the power of amending the Constitution belongs only to the Parliament and the State Legislatures, as laid down in article 368.

Some of the participants have quoted the opinions of Jawaharlal Nehru and Dr. Ambedkar, which they had expressed in the Constituent Assembly but they do not refer to what they said and did in 1950 onwards. Most of the amendments to the Constitution were made when Jawaharlal Nehru was the Prime Minister. They conveniently forget the later views and actions of Jawaharlal Nehru.

**L. M. Singhvi:** Statesmen as well as lawyers have a right to change their opinions.

**Gurmukh Nihal Singh:** Yes, I agree with Dr. Singhvi. As a matter of fact, we find that today members of legislatures change their opinions far too quickly and for reasons into which it is not necessary to enter here.

I do not dispute that it is the Supreme Court which interprets the laws or a provision of the Constitution or its amendment. For the time-being the interpretation or the views of the Supreme Court hold the field. But I do not admit that the Supreme Court has the power or right to bar this or any future Parliament from changing a law or constitutional amendment declared invalid by the Supreme Court.

Mr. Justice Hidayatullah of the Supreme Court has himself stated that the matter does not end here or that it is closed for ever. Even the Supreme Court may itself change the ruling as the present Supreme Court has overruled the previous decisions on the point. The composition of the Supreme Court changes and with the change in judges the views of the Supreme Court also change, as has been the case in the past.

As the time is almost over I would refer to only one more point. May I point out that it is relevant in making changes in the Constitution and laws not to lose sight of the Preamble and Part IV of the Constitution. In this connection I would like to draw attention to what the Preamble as well as the directive principles say: The Preamble guarantees liberty

of thought, expression, belief and worship, but significantly, does not add "Freedom of Property" or guarantees "Right to or Ownership of Property". The governing factor is not, as stated by some articles, 13, 31 or 32, but the Preamble and the provisions contained in Part IV, *i. e.*, "the Directive Principles of State Policy". The general policy enunciated is laid down in the phrase "Justice social, political and economic". The same phrase is to be found also in the Directive Principles of State Policy. As a matter of fact, opinion has been expressed both by Mr. Justice Hidayatullah as well as Mr. J. B. Kripalani, who was the Chairman of the Committee for drafting of fundamental rights, that it was a mistake to include the Right to Property within Part III—Fundamental Rights—as the concept of property has been undergoing constant and even radical change. Mr. Kripalani has also admitted that Part III has been badly drafted and arranged, implying that they need a drastic change and redrafting. Values, which are fundamental could be separated from those which are not so fundamental and much more liable to change.

One final word before I close. If this deadlock between the Parliament and the Supreme Court continues, the ultimate way to resolve the issue would be an appeal to the electorate by holding a General Election on this specific issue. But, after all, the present Parliament was elected only recently, *i. e.*, in February-March, 1967, and, in my opinion, is fully competent to make whatever amendments it may consider necessary. Under a Parliamentary System of Government, the final appeal lies to the electorate.

**L. M. Singhvi:** May I request the Chairman, Shri Ashok Chanda, to make his concluding remarks.

**Ashok Chanda:** At this late hour, I do not wish to take more than two or three minutes of your time. It has been a very stimulating exercise for which we are grateful to the sponsors of this Convention, in particular to Dr. Singhvi. But I am afraid it has led us nowhere and we are where we started. There does not seem to be any possibility of reconciling the sharp differences aired. But that is perhaps immaterial.

Dr. Singhvi made a point when he referred to Mr. Kumaramangalam's paper that we should focus attention in this session on the link between the directive principles and the fundamental rights. Mr. Chari had posed earlier that if any law were to be made to give shape to the directive principles, and if it came into conflict with fundamental rights what would happen. The fundamental rights are justiciable, the directive principles are not. But I think in a progressive society, we may have to infringe or abrogate the fundamental rights to give shape to the directive principles.

It has also been mentioned that both Pandit Motilal Nehru who was in charge of drafting the fundamental rights in 1928 and Jawaharlal Nehru later had considered them immutable. But we must not forget that the fundamental rights were conceived against the background then existing. In 1928, India was under British rule and we considered that there must be certain rights which must be fundamental and immutable beyond the reach of the government to tamper with. And even in 1947, we had not quite got over that complex, that apprehension. Perhaps when Jawaharlal Nehru and Dr. Ambedkar spoke in the Constituent Assembly, they were still obsessed with the history of the past.

The courts have held, and I think we should also equally hold, that it is not right in interpreting a constitutional provision or any law to import into it any views expressed by anyone at the time these enactments were made, however eminent they might be.

With great respect to the Supreme Court, I must say that the feeling still lingers in the minds of many that the majority was influenced by the political instability in the country and the recent trends in the realisation of the economic and social objectives of the State. Need there be any apprehension that a Parliament which has been elected on adult franchise would not be responsible, would cease to be democratic and tend to be authoritarian brushing aside and subverting all human values? What is it that we want as an alternative? A suggestion has been made that we might have a Constituent Assembly. Who will elect the Constituent Assembly? The same people who have elected Parliament. Secondly, a Constituent Assembly, as I mentioned earlier, can by a simple majority, even a precarious majority, scrap the whole Constitution, whereas Parliament is not in a position to do so. Parliament has to mobilize—any party in power has to mobilize—and command a two-thirds majority in the House to be able to amend the Constitution. If we hold on to the view that the fundamental rights are immutable, like the laws of the Persians and the Medes, as Justice Das aptly said earlier, we would reach the absurd position that even when the people of the country want certain changes, their elected representatives are not in a position to give effect to their wishes. What would be the alternative then? Do we want to face a revolution or do we want to be able to give the people what they want by a process of evolution? I suggest that our Constitution by prescribing different amending processes has taken care of that and there are no restrictions or limitations on the power of Parliament to make constitutional amendments to accord with the moods of the people and to meet their needs from time to time.

I do not want to take any more of your time. There will be more points developed in the course of our continuing discussions. But I



personally see no solution. The judgment of the Supreme Court is the law of the land at the present moment and nobody, not even Parliament can set it aside. But I do not think that the suggestion of someone, who was called the marginal judge yesterday, that a Constituent Assembly should be set up and it should have greater powers than the authority which created it is the answer. We have to find some other solution. With thanks to you all, I close the morning session.

**L. M. Singhvi:** A very hearty vote of thanks to the Chairman and the members of the Presidium Panel. We may adjourn until 3 p.m. today.

## Second Business Session

**Subject:** Nature, extent and limitation on the Supreme Court's power of judicial review with particular reference to constitutional amendments and the doctrines of *Stare Decisis* and Prospective Overruling.

*Chairman:* Mr. N. C. Chatterjee, M.P.

*Rapporteur:* Dr. C. B. Agarwala

**L. M. Singhvi:** The business session this morning kept us pre-occupied with the not so legal aspects of the matter. We discussed social philosophy, we discussed inter-relationships of directive principles with fundamental rights, and as Mr. Asok Chanda pointed out, now we are delving into a realm which is more judicial. As you know, the subject of the discussion this afternoon in this third session of the Convention is "The scope of judicial review and the doctrines of *stare decisis*, prospective over-ruling and acquiescence".

**G. C. V. Subba Rao:** I agree with the observation that the substantive power of constitutional amendment is to be sought only in article 368. No doubt it was argued that the procedural part only is in article 368 but not the substantive power of constitutional amendment. That was the argument which prevailed no doubt with the majority in *Golak Nath's* case. But I would submit that the earlier view propounded in the decision in *Shankari Prasad's* case that the substantive power also was in article 368 itself is a sounder view which may be accepted. But even though the majority have come to the conclusion that the substantive power is to be sought elsewhere, practically they have come to the same conclusion though by another route. Even though it has to be sought in the residual power, it is again with Parliament. So whether article 368 itself is giving that power of constitutional amendment to the Parliament, or whether the power is given by the residual article, it is the same thing. The conclusion is the same but it will not solve the problem. Whether the power is subject to any restrictions in other parts of the Constitution, that is the principal question. So, while I agree that the power is to be traced to article 368 itself, and need not be sought elsewhere, that will not conclude the question. We have still to find out whether article 13 contains a restriction on article 368 and it was

there Justice Patanjali Sastri ruled in the earlier case that because there is a conflict between article 368 and article 13, he was prepared to invoke what he called the rule of harmonious interpretation. He said that 'law' does not include 'constitutional law' in article 13, cl. (2). But the majority now have concluded that there is no conflict at all between article 368 and article 13. Therefore, there is no need to invoke the rule of logical interpretation and that they are prepared to supply the rule of grammatical interpretation and include constitutional law, which is the end product of the exercise of constituent power, in 'law' as used in article 13(2). So 'law' includes, according to the majority, 'constitutional law' also, but a way out has been shown by the majority judgment itself when the judges were pressed with the question, "How are we to abrogate or to modify or curtail the scope of these fundamental rights, if it becomes necessary to do so and if there is no such power in Parliament?" The observations in regard to this question would appear to be *obiter dicta*. Even if these *obiter dicta* were not there, we might well have come to the same conclusion. The learned judges pointed out that no constitutional law can abrogate or modify Part III. But if you are able to give a constitutional fact the judges are prepared to embrace it, and that constitutional fact will not be in any manner capable of being struck down, because article 13 will apply only if there is a law, whether it is a constitutional law or otherwise. The constitutional fact is that the Constitution has been amended in a particular way. If that is done by Parliament, it will become law, although it may be constitutional law passed in the exercise of constituent power. So it should not be done by Parliament but must be done by somebody else. It may be by a constituent assembly, according to one suggestion. It may be by a referendum to the people. Suppose by a referendum to the people we are able to give such an amendment, no Court can say it is a law because law must be through a legislative body. It is not a constituent power which could be described as a legislative power. Whether a constituent power is legislative power or not, is not a question which can be answered in the abstract. Who is exercising that constituent power? That is the question which we have to ask. If that constituent power is given to a legislative body, it will be only legislative power. When we expound the Constitution, we would be giving various names to various types of legislative power. We may call one power a police power, another power the power of eminent domain, another a taxing power, and still another we may call constituent power. That is only for purposes of analysis, for purposes of facility of expression. But its essence is the same. A constituent power, which is given to the legislative body, will become only a legislative power. Therefore, the majority are not prepared in their latest decision to accept the argument that a constitu-

tional amendment must necessarily be regarded as something other than law. It depends upon the nature of the constituent power. Where exactly is it located? If it is given to a legislative body, it must be treated only as a legislative power. So whether it is *Shankari Prasad's* case or *Golak Nath's* case, this constituent power is located only in Parliament. According to the latter case, it is a limited power for article 368 is controlled by article 13. Therefore, what they are saying is "give us a constitutional fact. Please do it by referendum or please do it in some other way". That is only an *obiter dictum* but that is the suggestion which has been given to us and if it had not been given by the Supreme Court, perhaps we would have given a suggestion here in this conference room on the same lines.

So let us consider the real essence of this decision. We must present the amendment as a constitutional fact and not as constitutional law. In that way only will we be able to amend Part III without conflicting with the Constitution.

**S. L. Chibber:** I am very happy that this discussion suggests very forcefully one thing, i.e., that democracy is at work. Apart from this aspect of the matter, I feel that the trend in which the discussion over *Golak Nath's* case has taken place discloses rather a retrogressive step. I say this, because in 1942 I was associated with the freedom movement. At that time, since the Government was in the hands of foreign people, we all cried for fundamental rights, because our liberty was curbed. We all talked of civil liberties, and, if I might say so, those fundamental conceptions were later on in the Constituent Assembly given the shape of fundamental rights. There are so many speeches in the Constituent Assembly which have been read out to support the view that fundamental rights are really fundamental. Thus, the earlier swing in public opinion was in favour of fighting for fundamental rights.

Subsequently, those very people, who talked of civil liberties, and or fundamental rights, came into power. They felt that fundamental rights were to some extent standing in the way of working the Government machinery according to their way of thinking. This second swing took place when they felt that they were to do away with certain property rights, generally termed 'zamindari rights', and took to amending the Constitution for the purpose and made twenty one amendments so far. The cases of *Shankari Prasad* and *Sajjan Singh* were decided by the Supreme Court declaring these constitutional amendments valid. Those who thought that their fundamental rights were being curbed by these constitutional amendments made repeated protests. All their talking was in favour of the preservation of fundamental rights.

Then came certain other events: the Chinese invasion, the Indo-Pakistan war and consequentially the suspension of civil liberties by

means of the Presidential declaration of Emergency. Then again people talked in favour of fundamental rights and against curbing of the fundamental rights. In the wake of these developments came the decision in *Golak Nath's* case.

This is the third swing in public opinion, that is, if the fundamental rights cannot be changed or abridged by means of constitutional amendments some administrative difficulties might arise. It is said that there might be some lacuna in fundamental rights and even those lacuna cannot be filled up if the power of amendment is not there. This suggestion is purely hypothetical. If anybody's apprehension is that in case of emergencies or other situations of similar type the fundamental rights will stand in the way of administration, they should remember that the 'Emergency' provisions of the Constitution would not let such an eventuality arise.

Well, if we analyse who were the people who talked most eloquently against *Golak Nath's* case, talking entirely for myself, I think it is the Government benches who really felt perturbed that possibly *Golak Nath's* decision created an hindrance in the way of future legislation and possibly, therefore, if any further curtailment or abridgement of fundamental rights is necessary, then that cannot be carried out. I would only say that before one really feels any apprehension he should go through the chapter on fundamental rights and see what it contains. It contains our cherished ideas, our cherished freedoms. And if any judgment has gone to preserve it, there is no necessity at all to get perturbed.

Talking about the discussion as to what should be done if there was any necessity to abridge fundamental rights by constitution amendment, some suggestions have been mooted, e.g., making a reference to the Supreme Court; Parliament's power to act in the nature of a Constituent Assembly; Supreme Court's power of prospective over-ruling; and a referendum. Since the time allotted at my disposal is short, I shall barely touch on these subjects. It has already been expressed by a previous speaker that the power of making a reference to the Supreme Court is inadequate, the main reason being that it would only be an opinion and the judgment in *Golak Nath's* case would still hold the field as the law. There is nothing strange in the doctrine of prospective overruling. Nobody need feel perturbed about the adoption of this juristic theory because a practical view of the case has been taken by the Court. Since two decisions of the Court were already in the field, *Shankari Prasad's* case and *Sajjan Singh's* case, and the Supreme Court was about to take the view that the earlier view was wrong, they took a practical step so that the earlier constitutional amendments which have been passed and the changes which have taken place may not be disturbed by means of the decision in this case. When it was said that there are American precedents justifying the adoption of the prospective over-ruling another

speaker expressed the view that American decisions have no application to the cases in India because the situation is entirely different. I may say, with respect to that honourable speaker, that we have borrowed heavily from American jurisprudence: The courts have considered themselves free to consider all juristic principles available to them. In one case a reference to even Sanskrit texts was made by the Supreme Court and Justice Mahajan then observed that he would seek light from whatever source it might come to him. Therefore, there should be no hesitation in drawing upon American principles or in drawing upon principles of law followed in other countries and so far as principle of prospective over-ruling is concerned, there is nothing that should perturb anybody.

Now about the position of fundamental rights after the Supreme Court decision in *Golak Nath's* case, it is a very simple matter. When *Shankari Prasad's* case held the field, it was the decision of the Supreme Court. The *Sajjan Singh* case which came later on is again the judgment of the Supreme Court. The decision in *Golak Nath's* case is also the judgment of the Supreme Court. If eleven judges in this case felt the necessity of reviewing the earlier decisions you might envisage a necessity when 13 judges might review the judgment of the eleven judges' Bench. All that would be necessary when such a situation comes up is that public opinion might require that more judges be added to the Court and they might in their mature wisdom reconsider their decision in *Golak Nath's* case. That is about the real position in the matter.

Before I conclude, I would say that the subject is to be discussed within the framework of the Constitution. Keeping in view the accepted principles of jurisprudence, nobody need hardly feel perturbed that judges legislate. Judges are known to legislate by means of interpretation. The regular legislation is in the hands of the legislators but judges do, by means of interpretation, in a sense legislate and that power of the judges, that right of the judges, is well recognised. So far other political theories and juristic principles have been discussed in a detached manner and torn from the context of the Indian Constitution. They have absolutely no bearing on the question, save that we are concerned with them in the functioning of a democratic republic.

Ultimately, constitutions are studied in the light and in the background of accepted constitutional principles. Therefore, I will say a constructive approach to the question would be to study the whole question in the light of our Constitution, accepted juristic principles and the decisions of the Supreme Court. The Supreme Court can review its earlier decisions when in the view of the Court it is necessary to do so. All that is needed is another case which would analyse the implications of this case.

**T. K. Tope:** Although we are discussing in this session judicial review, *stare decisis* and prospective over-ruling, I will restrict my observations only to judicial review; how our Supreme Court has reviewed its earlier judgments up till now, the trends that have been seen in the Supreme Court's decisions, and what would be the solution to the present difficulty. I have referred to the famous observations of Mr. Justice Holmes as regards the interpretation of Constitution. "Great constitutional provisions have to be administered with caution. Some play must be allowed for the joints of the machine and it must be remembered that legislatures are ultimately the guardians of the liberties and the welfare of the people in quite [as great a degree as the Courts." This was said by a judge of the American Supreme Court.

When we were drafting our Constitution, Sir B. N. Rau had gone to the U.S.A. in order to consult legal opinion there as regards the nature of fundamental rights. We have on authority that when Sir B. N. Rau discussed the matter of fundamental rights, the late Mr. Justice Frankfurter, who was a great champion of fundamental rights in America, advised Sir B.N. Rau not to include the 'due process' clause in the Indian Constitution. He said inclusion of 'due process' clause in the Indian Constitution will give very wide powers to the judiciary or judicial review with the result that the Constitution will be full of many difficulties. When the question came as regards judicial review, it was said that Justice Frankfurter thought the judiciary, as far as possible, should not interfere in legislation. When the question came as regards certain freedoms being accorded preferred position as they are called in America and certain other freedoms being ordinary freedoms, Justice Frankfurter advocated judicial self-restraint, a point of view which all judges should remember.

If we look to the Supreme Court and the history of the Supreme Court in India, the *Golak Nath* judgment appears to be the culmination of a particular trend seen in a particular judge who was ultimately in a position to influence the whole Court.

So far as the right to property is concerned, the Supreme Court had consistently taken a broad view. Right from *Kochunni's* case onwards, an attempt was made by the Supreme Court to safeguard the right to property to the utmost extent. If you turn to earlier judgments of the Supreme Court you would find that the Supreme Court refused to correlate articles 21 and 19. When attempts were made to relate them Chief Justice Kania pointed out that article 21 is not controlled by article 19. It was Mr. Justice Subba Rao, who, for the first time laid down in *Kochunni's* case that the right to property is controlled by article 19, and this construction started a new phase in the history of the Supreme Court.

From *Kochunni's* case we come to various stages. Although Parliament has said that adequacy of compensation cannot be questioned in any Court of law, in the *Vajravelu's* case the Supreme Court said that we know that we shall not be able to challenge the adequacy of compensation but whether the compensation is illusory or otherwise, is for us to decide, and if the compensation is illusory, the Legislature has committed a fraud on the Constitution. Then came the *Golak Nath* case. Therefore, as far as right to property is concerned since *Kochunni's* case, there was definitely a trend seen in the Supreme Court to protect right to property by some means or the other. In *Kochunni's* case they started by correlating article 31 and 19. In *Vajravelu's* case they said it is illusory compensation they question and now in *Golak Nath's* case they come to the conclusion that you cannot amend fundamental rights at all.

Whereas in respect of other fundamental rights, it has been maintained that the Supreme Court has been guarding our fundamental rights, but my submission is that the Supreme Court was not as careful of other fundamental rights as it was in the sphere of right to property.

Let us take *Makhan Singh's* case, which all of us know fully well. With the proclamation of Emergency our fundamental rights under articles 14, 19 and 21 together with the right to move any court under article 32 or 226 were suspended. An attempt was made to move the Supreme Court under S. 491 of the Cr. P.C. Here was an opportunity for the Supreme Court to protect the fundamental rights to life and liberty which is more important right than the right to property by resorting to S. 491 of the Cr. P.C. It is part and parcel of our existence, of our own making than the right to property. But the Supreme Court took the view that as a remedy under the Constitution is suspended by implication the remedy under S. 491 of the Cr. P.C. is also suspended. The implication was extended for the purpose of denying the fundamental right to life and liberty. This shows that the Supreme Court has come to make a distinction between fundamental rights of lesser significance and fundamental rights of more significance and in the Court's estimation the right to life and liberty is not that much fundamental as the right to property appears to be.

Having set this background, I consider the question whether *Golak Nath's* case should remain law? Of course it is always open for the Supreme Court to review its own judgments.

A reference was made by Mr. N.C. Chatterjee, yesterday, that under article 143, advisory opinion of the Supreme Court should be obtained. With great respect, I would submit that this will not be possible. Even if you refer to the Supreme Court under article 143, the Supreme Court is not bound to give its opinion. Whether or not to give opinion is left to the discretion of the Supreme Court. That is what article 143(1) says.



Secondly, it is not yet clear whether an advisory opinion can overrule a decision of the Supreme Court. Although in the Special Reference in the U.P. Legislature and the Allahabad High Court case the Court considered the case of *M.S.M. Sharma* and expressed view against it. But it was on the grounds altogether different from *M.S.M. Sharma's* case.

It is to be considered how the power of review can possibly be exercised in order to do away with the mischief of *Golak Nath's* case? There are two ways of doing it. One way would be to amend article 368 and confer power on Parliament to amend the fundamental rights. Then that particular amendment is bound to be challenged before the Supreme Court giving it an opportunity to review.

The other way to review judgment would be to send another case or petition before the Supreme Court without going through the formal amendment of the Constitution. I personally would like this method to get review of the judgment rather than make an amendment to the Constitution for the simple reason that the Supreme Court would then realize that the *Golak Nath* case has created so many problems. I will mention only a few of these problems.

Take the case of the Constitution Ninth Amendment. It allowed Berubari Union to be transferred to Pakistan. In the majority judgment in the *Golak Nath* case it is said that only 1st, 4th and 17th Amendments are valid. According to my interpretation the Ninth Amendment so far as it allowed Berubari Union to be transferred to Pakistan, denied the right to property to the citizens who are in Berubari Union. With the result the Ninth Amendment is unconstitutional and Berubari Union cannot be transferred at all.

As an another illustration take the case of reservation of seats for Scheduled Castes. The reservation is being done for the last twenty years. In 1970 probably again we may be faced with the problem of extending the period of reservations. (This has already been done—*Ed.*) If we extend the period for making reservation by amending the Constitution, it is possible for some one to challenge that amendment on the ground that it contravenes article 14 or article 15 or article 16.

The abolition of Privy purses is a controversial issue. The word 'guarantee' is used in article 291 which says "A sum that is guaranteed to the Princes...." If by amendment of that particular article the word guarantee is deleted a view might be taken that it deprives the Princes of their right to property as such and can be challenged as being unconstitutional in the light of the *Golak Nath* case.

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We have got to see, what exactly is the question that we are deciding? Are we deciding what the fundamental rights are and what their nature is? What exactly do we mean by the word that they are *fundamental*? How *fundamental* are they? Or, as some people said, are some rights more fundamental than the others?

The first observation which I have to make is that so far as the rights are concerned, the declaration of what may be called rights is not enough unless a remedy is provided. That remedy has been provided in article 226 and above all in article 32. In order to contrast the difference between what may be called pure right without remedy, I might read article 17 which in effect says: 'Untouchability has been abolished and its practice in any form is forbidden and shall be an offence punishable by law.' Unless there was a law made there will be no punishment resulting from the prescription of article 17. And if there is a law, then article 17 may as well not have been there. Therefore, it is a case of bare declaration of right without remedy. But so far as the abolition of untouchability is concerned, it is already adequately provided in article 15 (2) which prohibited discrimination on account of religion, race, caste, sex, place of birth or on any of them.

I will take the other aspect. Take article 32, for instance. In the judgment under discussion a point was made, but not adequately. That is, all these constitutional amendments were passed by a two-thirds majority in the Parliament. In fact, as far as I remember, the States' approval was secured for these amendments. The objection was raised during the course of the argument that the Parliament by abridging the right to property by way of constitutional amendment has practically affected the jurisdiction of the High Courts and the Supreme Court, and since they have curtailed the powers of the High Courts and the Supreme Court and there being no ratification of the States they are unconstitutional for not complying with the requirements of article 368. As a result the position of the right to property became a remedy without right. Earlier I cited article 17 as a case of a right without remedy. Now, I am going to deal with the other side of the case, that is, a remedy without right.

*It may happen that all the rights are taken away by constitutional amendments keeping intact article 226 because article 226 could only be wiped out of the Constitution by securing the ratification of not less than one half of states. It would be the case of an availability of remedy while the right has gone away. This is as meaningless as a right without remedy. Therefore, the submission which I am making before you is that the declaration of the right as well as the remedy is the hard core of that right.*

Taking these problems into consideration I say the *Golak Nath* judgment has opened a Pandora's box. The Supreme Court never thought that it would create all these problems. Therefore, I personally think that the earliest opportunity would be welcomed by the Supreme Court itself in order to review its own judgment and see that whatever has been done by the *Golak Nath* case is set aside.

Therefore, my humble submission to this Convention is that article 368 may be amended if that is necessary. Ultimately it is the Supreme Court which has the power to review its pronouncements. Just because Parliament has power to make law under Entry 77 in respect of the powers of the Supreme Court, the Constitution should not be amended saying that the Supreme Court shall not have powers to decide the validity or otherwise of these amendments made by Parliament. Parliament should not do that. Otherwise that will also be challenged before the Supreme Court. So let us amend article 368 only, if it is needed. That real solution to the whole problem will be the review by the Supreme Court of its own judgment. Luckily in the *Bengal Immunity* case it is laid down that the Supreme Court is free to over-rule its own earlier judgment, and I am sure that they will eventually over-rule the *Golak Nath* case. Thinking that it is difficult, it is pointed out that there should be an addition of two more judges to the Supreme Court. In my view it is not necessary because a Bench of eleven judges is adequately competent to over-rule the judgment of eleven judges.

**R. M. Hajarnavis:** The first observation that I make is that our Constitution begins with the Preamble which is historically inaccurate, legally untenable, but politically well justified. It says, "We the People of India." In fact the "People of India" never resolved. That is a historical truth. Some say, one of them being Mr. Setalvad, the legal power of the Constituent Assembly is derived from the India Independence Act. Some have denied this and said that such a power is inherent in ourselves. In any case, the power was not expressly given by the people of India. However, politically considered the power has been given by the people of India, because after it was framed, the Constitution was accepted by everybody, by every party in India and everybody in India decided to work the institutions created by this Constitution. Therefore, we have got to see what exactly was done here. At present, in this discussion, we are concerned with Part III. It has been variously stated that in Part III, certain rights have been created in favour of the citizens and non-citizens. Whereas Mr. Ramachandran took the view, and I am inclined to agree with him, that these are not rights but restrictions on the authority vested in some of the organs which the Constitution created, namely, the Legislature, the Executive and the others.

or 30 years, these words will assume new meaning. Is it necessary to change the meaning? I submit, no. The meaning changes with the change of time and circumstances. Mr. Khera then referred to conscription as a ground justifying restrictions or curbs on the fundamental rights. May I tell him that in spite of the fact that there is a Bill of Rights in the American Constitution, there is conscription. There are people who object to conscription and suffer penalty for objecting to it. Therefore, whether or not there is a Bill of Rights conscription will always be there. I do not conceive that the Courts will deny, in the case of an emergency, any power that the State would require. For instance, if a house is on fire and a neighbouring house is likely to catch fire. You can pull that house down then and there. You do not have to go through the proceedings under the Land Acquisition Act. If in a war the forces have got to take shelter in a house in order to fight war, again you do not have to approach the land acquisition officer saying that I will pay compensation and only on his order take shelter. Similarly, if there is a saboteur operating behind the defence lines he will be shot dead without any kind of reference to criminal proceedings. So the ordinary power is always outweighed in order to meet any kind of grave danger.

But what is trying to be done by whittling away the fundamental rights is the vesting of extraordinary power in the executive of the country. Please remember this that in this country we have a parliamentary executive. Instead of the legislature dominating the executive, the executive dominates the legislature. There is nothing which the legislature will deny to the executive. Please also remember that no proposal involving money can go before a Parliament unless it is on the recommendation of the President, which means the executive. Today we find the executive seriously concerned, excited, exercised about this judgment just because it has reduced the power of the executive considerably.

Now, I will take the very example which fell from the Chairman last evening namely he wanted certain lands to be acquired for rehabilitating refugees. It is an excellent purpose, a purpose for which every paisa ought to be found, every kind of efforts ought to be made and, if necessary, a new law ought to be made and enforced. But the experience has been that once such a law is made it is not the big man's land but the small tenants' land which is acquired. What would I do in a case like this? I would certainly pay him full compensation and at the same time introduce a capital gains tax and get all the money from him if it is undeserved one. Otherwise what is happening so far as the fundamental rights are concerned? They belong to the big corporations and big land owners. They are not effectively exercised by small people and in order that they

In Britain there are no guaranteed fundamental rights. There is only remedy. The remedy is *habeas corpus*. No one's freedom is guaranteed. But there is the remedy. The remedy itself works.

The question that we have to consider is whether the right remains if the remedy of judicial review is taken away. At this stage I advance one proposition for your consideration. A federal constitution is a constitution of limited legislatures—irrespective of the fact whether it provides for fundamental rights. In other words, in a federal constitution you cannot dispense with the power of judicial review. But what has been done by these constitutional amendments made so far by our Parliament is the curtailment of the rights. No court has inquired into the extent to which the right has been cut away or reduced. The operative fact in all these constitutional amendments is that judicial review has been completely blocked in respect of certain rights.

I would like first to consider, whether the removal or exclusion of judicial review in this way was done legally and whether it could possibly be done. If the Supreme Court has held that they have the power and jurisdiction to consider, in spite of all the constitutional amendments, as to what the nature of those amendments are then, I submit, to that extent judgment of the Court would be right.

Whenever limitations are placed by the constitution on the legislature, there can be no question of excluding the jurisdiction of the courts to scrutinise and examine whether the legislature has acted within the constitutional limitations. That can never be done. In so far as the amendment purport to override constitutional limitations, I submit, that the judgment of the Supreme Court in *Golak Nath's* case is quite right.

I come to the difficulties pointed out by Mr. Khera which result from the *Golak Nath* case. He said the law should be certain. I entirely agree with him. I regard the fundamental rights very important because they are the frame of reference with reference to which and the scale on which every law ought to be judged. If Mr. Khera concedes to the legislature the power of amendment then the enquiry which he was making—What of the fundamental rights, this week? would as well be present in such a case. The question is not what the law is this week but how the laws change. What is the latest position in fundamental law or in the fundamental rights? I suggest to those of us who believe, that there must be constant frame of reference of values, or to take an expression used by Mr. Ayyangar, "judgment values", that the scope of the concepts or words go on changing from time to time. As to the equality clause in the American Constitution once the United States Supreme Court had said that "equal but separate" satisfy the equality clause. Today it does not say so because of the changed circumstances. It is possible that after 20

or 30 years, these words will assume new meaning. Is it necessary to change the meaning? I submit, no. The meaning changes with the change of time and circumstances. Mr. Khera then referred to conscription as a ground justifying restrictions or curbs on the fundamental rights. May I tell him that in spite of the fact that there is a Bill of Rights in the American Constitution, there is conscription. There are people who object to conscription and suffer penalty for objecting to it. Therefore, whether or not there is a Bill of Rights conscription will always be there. I do not conceive that the Courts will deny, in the case of an emergency, any power that the State would require. For instance, if a house is on fire and a neighbouring house is likely to catch fire. You can pull that house down then and there. You do not have to go through the proceedings under the Land Acquisition Act. If in a war the forces have got to take shelter in a house in order to fight war, again you do not have to approach the land acquisition officer saying that I will pay compensation and only on his order take shelter. Similarly, if there is a saboteur operating behind the defence lines he will be shot dead without any kind of reference to criminal proceedings. So the ordinary power is always outweighed in order to meet any kind of grave danger.

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are exercisable by the people there should be a healthy check on the executive. For that, I suggest, fundamental rights should not be touched at all.

Then I may merely remind you that it was possible for us without the *First Constitutional Amendment* to sustain agrarian reform legislations in spite of article 31(1). We argued the case before the Nagpur High Court and we could satisfy the conscience of the Court that the compensation paid was really adequate. The same view was taken by the U. P. High Court. But the Government, as Mr. Chari said, was taken by panic and they rushed through the constitutional amendments. What was the amendment? The amendment was not the curtailment of the rights but the exclusion of the judicial remedy in effect as provided in articles 32 and 226.

Another thing that I would say, the choice is not between status quo and revolution. The question is always posed as if we are going to keep all the rights as they are and that revolution would break out tomorrow. That is not the choice. The choice is between choosing right legal remedies. For instance, as I said, in 1930 the Constitution came into being. Immediately after that we had this Constitution First Amendment. When we had all these land reforms bills pending at the time Constitution was framed and it was our party which was committed to it and was trying to put them through, why did we ask the Supreme Court to decide the case finally? There is a doctrine in the U. S. A. called "living with the Constitution". Why not try to see what the Constitution is and try to live with it? Why rush to amend it? I know at least one amendment undertaken was absolutely superfluous. Mr. Sarkar knows it. Probably he opposed it in the Law Ministry. The question was whether the State could undertake state trading. One view was that the State could not do so. The view that Mr. Sarkar and other people took was that it can be done. One lawyer took the view that it could not be undertaken. So without testing that question in the Supreme Court, we amended the constitution. Now, I would, therefore, suggest that before we rush to any kind of legislation to amend the Constitution it is better we wait for the Supreme Court to decide it. Let it decide in one case, let it decide in a second case, let it decide even in a third case. Once the controversy is settled, or appears to have settled, certainly Parliament would be justified to amend the Constitution suitably. But why do



the quantum of rights in a property. In fact this was a wrong word used in article 31A and to overcome the difficulty presented by it we took to amending the Constitution. This is what happens when we undertake very hasty, hurried and ill-considered legislation, and for which I take the responsibility because I was in the Ministry at that time. What happens is like this: (I am using the names as an illustration) Mr. Khera comes to Mr. Sarkar and says: this thing is absolutely necessary and these fundamental rights are likely to stand in the way. Will you please exclude them? And Mr. Sarkar excludes them all.

Secondly, suppose I am a Minister in charge of a department and my brain is fired with a certain scheme, and I want it through before my time runs out, (which at the most, at that time, appeared to be five years). And then if Mr. Dutta points out to me several difficulties in legislation and other things and asks me: Can they not be put out? I just say they ought not to. I must say this is not a wholesome practice. Let the process be slow. After all, when the legislation is made, it is not a big corporation or big people, or big land-lords who suffer. It is the small man, with no resources whatsoever to take up the challenge of the State and no strength to stand when the chariot of the State rolls on the road who ultimately suffers. It is for that man the fundamental rights are meant and for their purpose they ought to remain. Therefore, I say, it is not in every case he will be able to go to the High Court or the Supreme Court. But the fear of the High Court or the Supreme Court is a great check, firstly upon the executive, and since the legislature is only approachable through the executive it is also a check, secondly, on the legislature. Please remember the fundamental rights are firstly a check upon the executive.

**C. B. Agarwala:** As this session is confined to a consideration of the limits of judicial review, with special reference to the doctrines of *stare decisis* and prospective over-ruling, I will say a few words on these doctrines. I am in entire agreement with the view of the majority of judges in *Golak Nath's* case, that the Supreme Court has the power to lay down the doctrine of prospective over-ruling. This is what I am going to submit from a purely legal point of view.

When the majority in *Golak Nath's* case took the view that Part III of the Constitution could not be amended, because it was fundamental and that article 368 would not cover any amendment of Part III of the Constitution, they were faced with the difficulty as to what would happen with regard to those amendments which had already been made and acted upon. Between 1951, when the first amendment was made and the decision in *Shankari Prasad's* case was delivered, and 1967 when *Golak Nath's* case came to the Supreme Court, the Legislatures of various

are exercisable by the people there should be a healthy check on the executive. For that, I suggest, *fundamental rights should not be touched at all.*

Then I may merely remind you that it was possible for us without the First Constitutional Amendment to sustain agrarian reform legislations in spite of article 31(1). We argued the case before the Nagpur High Court and we could satisfy the conscience of the Court that the compensation paid was really adequate. The same view was taken by the U. P. High Court. But the Government, as Mr. Chari said, was taken by panic and they rushed through the constitutional amendments. What was the amendment? The amendment was not the curtailment of the rights but the exclusion of the judicial remedy in effect as provided in articles 32 and 226.

Another thing that I would say, the choice is not between status quo and revolution. The question is always posed as if we are going to keep all the rights as they are and that revolution would break out tomorrow. That is not the choice. The choice is between choosing right legal remedies. For instance, as I said, in 1950 the Constitution came into being. Immediately after that we had this Constitution First Amendment. When we had all these land reforms bills pending at the time Constitution was framed and it was our party which was committed to it and was trying to put them through, why did we ask the Supreme Court to decide the case finally? There is a doctrine in the U. S. A. called "living with the Constitution". Why not try to see what the Constitution is and try to live with it? Why rush to amend it? I know at least one amendment undertaken was absolutely superfluous. Mr. Sarkar knows it. Probably he opposed it in the Law Ministry. The question was whether the State could undertake state trading. One view was that the State could not do so. The view that Mr. Sarkar and other people took was that it can be done. One lawyer took the view that it could not be undertaken. So without testing that question in the Supreme Court, we amended the constitution. Now, I would, therefore, suggest that before we rush to any kind of legislation to amend the Constitution it is better we wait for the Supreme Court to decide it. Let it decide in one case, let it decide in a second case, let it decide even in a third case. Once the controversy is settled, or appears to have settled, certainly Parliament would be justified to amend the Constitution suitably. But why do we immediately rush as soon as we apprehend that there is going to be trouble?

The same thing can be said about the interpretation of the word "estate". Everyone knows the significance of the word "estate". Anyone who knows English property law knows that the word "estate" means

respect of future transactions. By so doing, they save past transactions, and avoid future mischief that would result by the continuance of the error. It is with this object, on grounds of public policy, that the American courts have evolved the doctrine of prospective over-ruling. The doctrine in the words of Cornhill says: "A Court should recognise the duty to announce a new and better rule for future transactions whenever the Court has reached the conviction that the old rule established by precedent is unsound, even though feeling compelled under *stare decisis* to apply the old and condemned rule to the instant case and to transaction which had already taken place". This doctrine suits better with the modern dynamic state of society than the old doctrine of *stare decisis* at least in respect of constitutional matters.

The English courts do not seem to have adopted this doctrine. The Practice Statement issued by the House of Lords<sup>1</sup> does not mean that the House was thinking of this doctrine. What they said was that the past practice of adhering to views expressed by them in previous cases may not be followed but that they may depart from their previous decisions when it appeared to them right to do so, and in departing from a previous decision, they would bear in mind the danger of disturbing retrospectively the basis on which contracts, settlement of property and fiscal arrangements had been entered into and also the special needs for certainty as to the criminal law. What they were saying was that they will not like to depart from the previous decision without considering the danger of disturbing past transactions. They were not propounding the doctrine of prospective over-ruling.

The doctrine of *stare decisis* was evolved with the object of leaving undisturbed contracts, settlement of property and fiscal arrangements entered into in the past. It does not take into account the future harm that may be done to society, if the error is continued, especially in the field of fundamental human rights.

It has been objected that the doctrine of prospective over-ruling does not fit in the scheme of our Constitution. It is pointed out that article 13(2) declares the law to be void if it contravenes the provisions of Part III of the Constitution dealing with fundamental rights and that in several cases the Supreme Court has held that the Law which is *ab initio* void cannot be validated.

It is true that article 13(2) of the Constitution declares that the law which abridges or takes away the fundamental rights in Part III of the Constitution shall be void. And a law which is void *ab initio* cannot be validated. But as already observed, on the basis of the doctrine of *stare decisis* the Court adheres to its erroneous view and does not declare

1. Reported in (1966), *All England Law Reports*, p. 1234.

States have had brought about an agrarian reform in the country. Zamindaris and other intermediary estates had been abolished, special rights had been granted to tenants, consolidation of holdings in villages had been made, ceilings had been fixed and surplus lands transferred to tenants. The Court felt that if retrospective effect was to be given to their decision, it would introduce chaos and unsettle conditions in the country. It could not, therefore, contemplate resettling the whole agrarian pattern that had been brought about by the amendments on fundamental rights. The Court, however, felt that if this whittling away of fundamental rights was to take place in violation of the intention of the Constitution-makers, it would be permitting a great mischief to be committed against rights which the people had preserved for themselves and a time might come when a totalitarian regime might be brought about. Therefore, they evolved the doctrine of prospective over-ruling, namely, that their decision that fundamental rights in Chapter III could not be amended and that the provisions of article 368 of the Constitution merely lay down procedure and do not confer power to amend the Constitution would be binding for the future and the amendments already made in the past in contravention of article 13 (2) would stand.

The Indian courts, following the practice of British courts, have always followed the Blackstonian theory, that the duty of the court is not to make law but to maintain and expound the law. In other words, the judge does not make but only discovers and finds the true law. The theory is that the law had always been in existence. It is only to be found and declared. If an earlier rule of law is found to be wrong, then the later decision does not make a law, but only discovers the true rule of law. In addition to this theory, the courts have also evolved the doctrine of *stare decisis* namely, that the courts will not depart from the old interpretation of the law, even if they are convinced that that decision was erroneous, except when they consider that more harm than good would result from doing so. The doctrine of *stare decisis* has been evolved in order to secure stability, certainty and uniformity in the law and to avoid unsettling of contracts and other transactions that might have been entered into on the faith of the correctness of the rule as declared by the Supreme Court in its earlier decision. In this way a bad law may continue to be treated as valid under this doctrine. On the other hand, if the Court feels that continuance of error is calculated to do more harm than good, it need not follow the doctrine of *stare decisis*.

If it be the law that the courts have the power to act on the principle of *stare decisis*, there is no reason why they cannot evolve a modified form of this doctrine by confining it to past transactions, but not allowing the old interpretation of the law to continue in force in

the cases on the strength of prospective over-ruling not only in constitutional but ordinary civil cases. Till these cases come to the Supreme Court, there will be chaos.

**C.B. Agarwala:** How do they prospectively over-rule? Because the lower courts have no power for declaring the law under 141, as such this question does not arise.

**An Honourable Member:** I will say there is a case. A particular High Court may say that that particular Act is invalid. It is unconstitutional but as far as the things that have already taken place, they will remain valid. So in this particular case, the party that comes to the High Court will have only the satisfaction of, as the saying goes, 'the operation is successful but the patient died'. In such a case till the matter comes to the Supreme Court, unfortunately the judgment of the High Court will bind the parties. I feel that danger was probably not envisaged by the Supreme Court when they laid down these propositions.

**C.B. Agarwala:** This is applying the doctrine of *stare decisis* not of prospective over-ruling. This thing happens in every case. The High Court takes an erroneous view of the law and decides the case against a party. So long as the High Court's judgment is not set aside by the Supreme Court, the party is bound by that law, but he has to take the risk and appeal to the Supreme Court to have the correct law laid down.

**Ramaprasad Mukherji:** The first question which I want to raise is this. We are all thinking about the fundamental rights as declared in part III of the Constitution. Those were declared by the makers of the Constitution in the Constituent Assembly on behalf of the people of India. Taking into view the conditions as then existed one thing which appears patent to me is that the makers of the Constitution did not envisage what will be the nature of Government and the effect of party system of Government which was to follow immediately thereafter, although Mahatmaji had stated that that was the time for the Congress to go out allowing the country to be ruled by the people according to their notions. But as has been pointed out by my friend opposite that the party system of Government has introduced complications in the application of those principles which are enunciated as fundamental rights of the people. And I have also felt, not as a member of the executive, but as a member of the public, that it is more often to achieve some particular object that amendments have been made. I was just analysing the 21 amendments that have been made in 17 years. It is not correct to say that they were made in 17 years. In fact they were made in 7 years because in many of these years, there had been no amendments at all. As the amendments have very often been brought in with an idea to push through some particular legislation in view or to achieve

a law to be void, although in truth, it is invalid. It follows, therefore, that the constitutional provisions are subject to the doctrine of *stare decisis*. If that be so, there should be no objection to the application of the doctrine of prospective over-ruling which recognises the validity of the operation of the law for the past but negatives its operations for the future. Again it is said that in adopting the doctrine of prospective over-ruling, the Court may be said to have surrendered the fundamental rights of the individual contrary to its doctrine that it is the sheet anchor of the individual's fundamental rights; and that it cannot see them being waived by even the individual himself. This objection is also not tenable as on the doctrine of *stare decisis* the Court may not protect the rights of the individual in a particular case not only for the past but also for the future. The doctrine of prospective over-ruling at least saves his right from future encroachment.

In *Golak Nath's* case, the majority of the judges have formulated three limitations under which the doctrine of prospective over-ruling will be applied:

- (i) the doctrine of prospective over-ruling can be invoked only in matters arising under our Constitution;
- (ii) it can be applied only by the highest court of the country, that is the Supreme Court, as it has the constitutional jurisdiction to make the law binding on all the courts in India; and
- (iii) the scope of the retro-active operation of the law declared by the Supreme Court, superseding its earlier decision, is left to its discretion to be formulated in accordance with the justice of the cause or matter before it.

I am in respectful agreement with the view of the majority in *Golak Nath's* case so far as the applicability of the doctrine of prospective over-ruling to our Constitution is concerned.

**L.M. Singhvi:** Would you say that the doctrine of prospective over-ruling can be applied only by the Supreme Court? What is the specific argument for this proposition?

**C.B. Agarwala:** It is because the Supreme Court is the final court under article 141 of the Constitution to declare the law, so far as the courts are concerned. Then it is in the fitness of things that that Court alone should apply this doctrine and not the High Courts and the subordinate courts.

**L.M. Singhvi:** Just a question? How do you say that the Supreme Court alone will apply? Suppose the lower courts apply it and decide

*Golak Nath's* case has placed us in a position of great doubt and uncertainty. Even if we are to proceed according to the decision of the *Golak Nath*, it requires elucidation. In what way can it be done?

It has been stated, that Parliament has the power to convene a constituent assembly to abridge fundamental rights by amending the Constitution. To that an objection is taken that thereby a constituent assembly will be authorised by the Parliament which itself has no authority to amend the Constitution. Secondly, the adoption of the doctrine of prospective over-ruling gives rise to difficulties as to the manner in which it is to be applied and whether it should be applied as in America or in the limited way as laid down by the Supreme Court itself. These matters require very serious thinking. However, I agree with the Supreme Court's decision that they had no other way out but to apply this doctrine to the case on hand. Otherwise there would have been not only a chaos, as they say, but I would say a revolution throughout the country, if all these amendments declared to be void were given effect to from the time when they were made. But the difficulty for introducing prospective over-ruling is that article 13(2) leaves no opportunity to the Court but to declare it as void and if the Court declares it as void, it is void *ab initio*. Therefore, according to the Constitution, it could not have been done but being apprehensive of chaos the majority of the judges have done it. In my humble submission it was not done rightly or according to the Constitution, but it was proper in the sense that the conditions in the country required it.

**R.M. Hajarnavis:** There is a short point which I ought to have made earlier. In the American Bill of Rights, there are no qualifying clauses as we have in Part III of our Constitution. In spite of that the power to depart from the strict letter of the fundamental rights to meet adequately any kind of danger facing the nation has been conceded by the Supreme Court to the executive. For instance, even though freedom to write is an unqualified right under the American Bill of Rights, Justice Holmes said in a famous case that no one has a right to call fire in a crowded theatre. These kinds of limitations to the right have been read as inherent in the power itself. We could have, if possible, tried to operate within those restrictions, found out and explored how wide that area was, and finding that, but for over-riding the limitations, our social legislation would be contained, then alone it would have been justified to come to the legislature or come to the nation, asking that those permissible areas of limitations should be widened. Instead of doing that, as I said, in panic we have completely closed the doors to judicial review. Approached with restraint we could have saved both the fundamental rights as well as the wide area within which the executive and the legislature could operate. No one would deny to the legislature the

some particular object, I am of the view that the fundamental rights as they are declared in the Constitution require to be reviewed. By which body it has to be done and in what manner it will have to be done I shall deal with immediately. There are certain provisions amongst the fundamental rights which need to be amended from time to time. Take for instance, the rights of the depressed classes, or of those who are now requiring special protection of the executive and of the legislature. That protection is now limited for 20 years under article 334. By an amendment of the Constitution, the original period of protection was raised to 10 years, then 15 years, then 20 years. If the ruling of the Supreme Court in *Golak Nath's* case is to stand there can be no amendments of these articles as well.

There are other fundamental rights also which require revision in the light of the progress of the society. It is true that the ideals of the government and the principles which have been enunciated by the Congress or by some of the various parties are at variance to some extent with the propositions as laid down in the fundamental rights. Therefore, it is necessary that there should not be an infringement of the fundamental rights as laid down in the Constitution in the manner in which it is being done. At the same time there has to be some procedure by which necessary changes can be made.

This evening, we are considering the effects of the judgment of the Supreme Court as delivered in *Golak Nath's* case and whether *Golak Nath's* case should be reviewed by the Supreme Court? My view is that as at present, the position of the Supreme Court is guaranteed by the Constitution and no attempt should be made to affect it without giving another opportunity to the Supreme Court to review its own judgment. How is it to be done? It ought not to be done by making a President's Reference because that would be a limited one. But there will be other opportunities available immediately. There are at the present moment, so far as I know, other proceedings pending in some of the courts which will be coming to the Supreme Court in the near future to require it to review the case in its entirety. When it comes to consider those cases, if the Supreme Court sticks to the view as laid in the *Golak Nath* case with regard to the property laws only, the position of other constitutional amendments will have to be clarified because in the judgment of the Chief Justice care has been taken not to speak of the other amendments which have been made in the meantime. If those amendments are also void as a result of *Golak Nath's* case, then the position would be very difficult and all acts done or to be done in future on the strength of those amendments would be null and void. This would be placing the country in a very doubtful and uncertain position. Therefore,



the Supreme Court has suggested several remedies to which I shall refer. Before I proceed to do so, I would like to draw your attention to the language of article 368—just two lines of it. Article 368 starts as follows: "An amendment of this Constitution may be initiated only by the introduction of a bill". I would request you to underscore the words "this Constitution". The Supreme Court says 'this Constitution' does not include the provisions of Part III. After saying that 'this Constitution' does not mean "this Constitution", but it means 'this Constitution' minus 'the provisions in Part III', the Supreme Court says, therefore, you cannot by following article 368 touch or amend the provisions of Part III adversely. But you can touch or amend, provided that you thereby improve upon, widen or increase the number of fundamental rights by following article 368 but you cannot abridge or take them away.

I may briefly mention the findings of the Supreme Court in this respect in *Golak Nath's* case.

Firstly, the provisions relating to fundamental rights, because they are fundamental, cannot be amended. These provisions are not included in the words "this Constitution" occurring in article 368.

Secondly, the power to amend the Constitution is not derived from article 368. The article lays down merely the mechanics or procedure for amendments. The power to amend the Constitution is not a constituent power. There is no such thing as a 'constituent power' in our Constitution. It is merely a legislative power, derived from article 246, read with Entry 97 and article 248 of the Constitution. That being so, the Supreme Court finds that an amendment of the Constitution, because it is a law within the meaning of article 13 of the Constitution, is within the limits of judicial review and scrutiny of the Supreme Court.

This in a nutshell is the finding of the Supreme Court. Each of these points may have to be examined and scrutinised to find out how far it may be accepted or not. First of all, I would like to give only a simple illustration. Suppose it is said that the levelling of this particular road can only be done by the use of a steam roller. Is it necessary to say anything beyond this to show that there is a power to level the road with a steam roller? Similarly, in the same manner article 368 says, an amendment of 'this Constitution' may be made by the introduction of a bill. As the levelling of this road can be made by the use of steam roller, similarly, an amendment of this Constitution can be made by the introduction of a bill in Parliament. I do not understand what more was required in the Constitution to give positive power to Parliament to go in for an

widest necessary power. But the question is when you were putting through the social legislation it would have been seen whether it was necessary for us to abandon completely certain fundamental conceptions, the moral basis, as Acharya Kripalani said yesterday, of the society, certain ethical values, the irreducible minimum that are incorporated in the Constitution. Was it necessary that we should get rid of it in order to formulate and to execute our programme of social reform? I say, no. The difference between transformation by the democratic process and revolution is this, that in the democratic process while maintaining the structure and the internal values, we achieve rapid transformation. Our Constitution is capable of bringing about such a transformation provided we take enlightened and speedy steps.

**S. P. Sen-Varma:** After hearing so much discussion on *Golak Nath's* case, I feel that I am in the midst of fundamental confusion because the matter has been discussed from so many standpoints and angles that I am feeling at a loss as to what actually will be the decision of this Convention. I may mention here at the outset that the word "fundamental" has been used only twice in Part III and that also not in the substantive provision of any article itself. The word 'fundamental' has been used in Part III in the heading, and in the marginal note to article 13. The word "fundamental" has been used for the third time, not in Part III, but in Part IV, in the Directive Principles of State Policy, that is in article 37. Therefore, I am wondering whether we are justified in calling these rights fundamental in the sense that they are inviolate, inviolable and immutable. If the word "fundamental" carries that connotation, then why should it not carry the same connotation in respect of the directive principles of state policy? I, of course, say that what makes the rights, specified in Part III, 'fundamental', is the existence of article 32, by which the right to move the Supreme Court for the enforcement of these rights has been guaranteed. It is a right which has been guaranteed. In this respect the rights specified in Part III of the Constitution no doubt stand on a different footing but is that sufficient to warrant us in taking the view that the Supreme Court was justified in coming to the conclusion that Parliament, not Parliament-qua-Parliament but Parliament as a special body envisaged in article 368, should not have the power to make any change in the provisions relating to fundamental rights, abridging or taking away or whittling them down? If I remember aright, Mr. Justice Hidayatullah in several places in the judgment has said that the fundamental rights could be expanded, improved upon, their scope and amplitude widened. To that the Supreme Court has no objection. The only objection of the Supreme Court is that by making an amendment you cannot take away or abridge any of the fundamental rights mentioned in Part III of the Constitution. And

Thirdly, it is said that article 368 itself may be amended. As a matter of fact, as you all know, the honourable member of Parliament, Mr. Nath Pai, has already introduced a bill to amend article 368. He does not want to repeal article 368. His proposal is that a new provision should be added to that article providing expressly that "any article of this Constitution may be amended." But how far even that will help us in this matter, in view of the judgment of the Supreme Court, I am very doubtful about it. That Bill has, however, been referred to a Joint Committee. The Motion for reference to a Joint Committee of the Houses of Parliament has already been adopted in the Lok Sabha and I think it will also be adopted in the Rajya Sabha in this session itself. After the Bill has been referred to a Joint Committee, the Joint Committee will certainly give its thought as to how best article 368 can be amended. I would like to make one suggestion. Simply by providing that "any provision of this Constitution may be amended" may not be enough. I was thinking of this, and I think if the Convention gives its thought to this matter, which I am just now going to mention, then there may perhaps be a solution of the difficulties. Article 368 may be amended to provide for the addition of a new clause in that article which will say that if any provision relating to fundamental rights is to be amended that can be done by a constituent assembly and the composition of that constituent assembly may also be indicated in that article. For example, it may be said that this constituent body will consist of the members of both Houses of Parliament as well as a certain percentage of the members of the Legislative Assemblies etc. and lay down a proper procedure for the purpose. In this way we might perhaps get out of the present difficulty. Anyway, the Joint Committee will no doubt, I am sure, consider this aspect of the matter. But simply adding a clause to article 368 saying 'any provision of the Constitution may be amended', I think, in the light of the view of article 368 taken by the Supreme Court in the *Golak Nath* case will not help us very much.

In this connection I am again referring to the referendum. A referendum must be regulated by an Act of Parliament and, therefore, again it may be reviewed by the Supreme Court. After all, we must not forget that whether Parliament has this power to amend the Constitution, or by an amendment of article 368 we constitute another constituent body, the real safeguards for the fundamental rights and liberties lie with the people themselves. Because if the people are vigilant then perhaps nobody can take away their rights. Even the Government may think twice before touching their rights. We have a very recent case. Here I am referring to the Unlawful Activities Bill. It is a simple Bill. The provisions of the Bill, as it now stands, appear to be innocuous for it seems

amendment of the Constitution. In this respect, in regard to this finding of the Supreme Court, I would request you to have a glance at the three judgments of the Supreme Court : firstly, *Shankari Prasad's* case, secondly, *Sajjan Singh's* case ; and thirdly, *Golak Nath's* case.

In *Shankari Prasad's* case, the argument was that an amendment of the Constitution is 'law' within the meaning of article 13(3) and must, therefore, stand the test of scrutiny by the Supreme Court. But it was rejected.

In the next case, that is, *Sajjan Singh's* case, the same argument was canvassed and argued in greater detail, but it was again rejected therein. Chief Justice Gajendragadkar in his judgment expressed a view to which I would like to draw the Convention's attention. He said—before we parted with this matter, we should like to observe that Parliament should consider whether it would not be expedient and reasonable to include the provisions of Part III in the proviso to article 368. The question therein was whether the provisions of Part III should be amended by the simpler procedure as laid down in the substantive part of article 368. Therefore, he suggested that the provisions relating to amendment of fundamental rights should be included amongst the entrenched clauses specified in the proviso to article 368.

In *Golak Nath's* case, the present case, the Supreme Court has gone a step further. It says even the inclusion of these provisions in the entrenched clauses will not do. Parliament has no power to amend the fundamental rights, if such amendments abridged or took away any of these rights.

I have heard with the greatest attention the several suggestions which have been made to get out of the impasse which we feel has been created by the majority judgment of the Supreme Court. One suggestion is that there should be a referendum. But under what authority can a referendum be arranged? I ask this Convention, will there not be a law of Parliament for the purpose? Will not such a law of Parliament be justiciable and subject to judicial review? Secondly, it is said, there may be an advisory opinion of the Supreme Court under article 143 on a reference from the President. But I doubt very much that in respect of this clear decision of the Supreme Court in the majority judgment, the Supreme Court will at all agree to give any opinion under article 143(1), because the word used in article 143(1) is "may". It is not obligatory upon the Supreme Court to give any opinion at all. It may say, we have given our judgment in a contested case in the *Golak Nath*, and as such we are not going to give any advisory opinion. That would be the difficulty in seeking advisory opinion. Moreover, an advisory opinion is not binding upon anybody.

respect for the nature of Parliamentary Government, but that does not exclude the realistic appreciation of it. Elaborating what Walter Baghot said in the 19th century, and what Mr. Amery repeated afterwards that Parliamentary Government is Cabinet Government and Cabinet Government is Prime Ministerial Government. I would add Prime Ministerial Government is either Government by consensus or by caucus. The Prime Minister has colleagues. They are his (or her) equals. The Prime Minister is *primus inter pares*; chief among equals. Hence consensus. Prime Ministers are also party leaders, often the creatures of parties. Parties in turn despite democratic forms are conditioned or controlled by groups, caucuses, and not rarely by "bosses". It follows, therefore, that Parliamentary Government as a rule or at relevant times becomes in reality government by oligarchies, caucuses or even bosses.

Secondly, it ought to be remembered that politics, whether in terms of political science, or in the practice of politics in the best sense, or in the narrower sense of party politics, manoeuvres and tactics, is mainly concerned with the problem of power—its distribution, and the centre or centres of decisions. The expression "power politics" frequently used in derision is to that extent a misnomer, since the essential problem of politics is the problem of power. The real seats of power at any given time or in a given situation or system are often undiscovered and indeed undiscoverable.

Much of the controversy which we are now considering—I am not referring to Mr. Justice Hidayatullah's novel suggestion in his judgment in the *Golak Nath* case—had arisen because of a feeling in the country that the Government will amend the Constitution or is thinking or will do so in such terms as to circumvent the judgment, as it has sometimes done in the past. My teacher of political science, in London used to say—that was the time when cricket matches were played by amateurs and professionals who were termed "gentlemen" and "players"—there are two kinds of people at Lords—the cricket ground—Gentlemen and Players, *i. e.* the Amateurs and the Professionals. They enter the Club by different doors. They do not eat together but they both play cricket and together. They both claim to play according to the rules. Players, he said, play the game according to the rules. So do the Gentlemen, with this difference: when the game goes against them, they change the rules! That is also usual somewhat in the nature of governments too. I am not saying that this should be the case, or is always so, but only that those who have power will tend and seek to change the law when their vested interests or the path to their objectives, proximate or remote, are affected.

only to curb and control activities which *tend to disintegrate and disrupt* the sovereignty and integrity of India and nothing more. Still, the people's representatives in the Parliament, in the Lok Sabha, took a very strong stand against it. They said, we must have time to consider the provisions of the Bill thoroughly and the time is not enough.

Their voice was strong enough and the Government agreed that the Bill should be referred to a Joint Committee. That shows if the people are vigilant, if they are vociferous, if they are really sincere about their fundamental rights and liberties nobody can take away their fundamental rights.

In this connection I am reminded of what Viscount Bolingbroke, one of the foremost statesmen of Great Britain, said more than 200 years ago. He said, a wise and a brave people will neither be cozened or bullied out of their liberty; but a wise and brave people may cease to be such: they may degenerate. A free people may sometimes be betrayed but no people will betray themselves and sacrifice their liberty unless they fall into a state of universal corruption. As all governments began, so all governments must end by the people; tyrannical governments, by the virtue and courage of the people and even free governments will come to an end by their vice and baseness.

Therefore, ultimately, the final guarantee of every fundamental freedom lies in the people themselves.

**V. K. Krishna Menon:** You have had so many learned papers, case law, articles and constitutions, a whole galaxy of lawyers and even more powerful people, civil servants, around this table. It is, therefore, not necessary for me, and it is not my intention either, to go into the chapters and articles of the Constitution with regard to the question before us.

I would like to say at the outset, if you will permit me, that the questions relating to social institutions and ideas least lend themselves to discussion in a vacuum. We have perforce, to think and function in the context of a country, which at any rate when the Constitution was formulated had certain social outlooks and certain social principles. Whether you agree or not with some things, changes or else, we do know that situations alter, ideas change or are differently understood and interpreted. Social mechanisms, laws or anything else therefore, cannot be fully understood or interpreted as though they are static.

The first observation I would like to make here, arising from Mr. Hajarnavis's suggestion, is that the executive is not in fact so much controlled by Parliament as the Executive controls Parliament. I have great

judicial review, say, it is held that a piece of legislation is wrong. Government takes it back and puts in again corrective provisions. Thus, judicial review is only a process in the whole of the social processes that are involved in the impact of legislation upon the people.

In the immediate future, however, there is not much danger of the Constitution being played around with, because no government in the near future is likely to have in the legislature an overwhelming majority or even of the two-third required for this purpose. The argument whether fundamental rights can be amended or not is part of the argument which lawyers have raised. It may have no immediate significance, perhaps. The question raised is, if a right is "fundamental" can it be changed? Does 'fundamental' mean unchangeable? Or does it mean basic, in given conditions and not to be lightly tampered with? It is quite possible that if social progress went on at a certain pace the directive principles may be shifted from the present place to the earlier pages of the Constitution. There is nothing to prevent Parliament<sup>1</sup> from doing that. Mr. Justice Hidayatullah, whatever he meant by it, has said that an amendment means 'modification' of an existing clause. The shifting of a clause in Chapter IV to Chapter III need not then perhaps be regarded as a constitutional amendment. Some people, however, regard additions as amendments. So, if new fundamental rights are added, the courts have to decide, on balance of convenience, the relative scope of the concerned fundamental rights. If the convenience goes against the Government, the Government can put in a few more fundamental rights. Can any one take away from Parliament this power as set out in the Constitution?

I also maintain that the phrase "We the People of India" in the Preamble to the Constitution is historically correct. "We" constituted the real representatives of the people of India which became the Union of India. We are not living in a Greek City State where all the 'citizens' of the State could clap their hands or otherwise express assent or dissent. We can only have representative government—whether the representatives are elected one way or another. When the Constituent Assembly made our Constitution, they were not speaking, each for himself or only for those assembled. They were speaking for all the people of India in the context of the events that took place and ended the sovereignty of the Imperial Power. This is historically correct.

The aspirations of the people, the desires, or prejudices, or whatever they may be, are thrown up at an election, or in continuous or subsequent

1. Either according to the procedures of constitutional amendment or of Justice Hidayatullah's view that amendment "means modification and arrangement of Chapters is not modification by ordinary legislation." In either event the changes are most likely to be tested in the courts and thus be subject to judicial review.

When we come to the question of the amendment of fundamental rights, we have a question of great concern to every one of us here and indeed to the country as a whole. I would like to say that whatever the Supreme Court has said, whatever this meeting says, whatever anybody else say or has said, what exists today will be amended today, tomorrow, the day after or some other time. More so, if the people are so determined and are powerful since their interests, views or objectives are affected. So the substantive power of amendment remains whatever view may be taken of powers as set down in laws or constitutions. If this were not the case, law and laws would indeed be out of step with social change. If law, ordinary or constitutional, is out of step with social facts and people's will and determination, it will be the law and the articles of constitutions that will undergo change under social pressures, light or heavy! In a parliamentary and democratic system, the law makers should be, and would be wise to be aware of the urges and wills of the people and be in step with them.

What the courts would not or will not give, Parliament will have to give; and what Parliament will not give, the people will have given to them or they will take. This is the social reality. This is also the experience of the growth of law. That being so, what is there to prevent the Government, *i.e.*, a government of the future, in introducing two, three, four, five or six fundamental rights in addition to the present articles—shall we say, giving the tenant the fundamental right to own the land, or the employees the right to participate effectively in the control of management or the means of production, or strengthen on the other hand, the rights to property. More fundamental rights can be introduced into the Constitution. Then what is the remedy for those who differ? They can go to the courts. Thus, judicial review will always remain as long as courts exist. Even if the power of amendment of fundamental rights is denied, the articles of the Constitution as at present remain. What may or may not be done are then raised in the Courts. This is judicial review, by whatever name it is called. This right of review, it may be argued, can be amended by Parliament. But I would like to submit to you, that judicial review is not something absolute with a full stop. It is a process. We in the courts see it every day. Judicial interpretation will remain so long as there is the judiciary. This cannot exclude the interpretation of amendments, for the amendment once passed would be part of the law which they interpret. Fortunately or otherwise, for us, lawyers, we have a Law Ministry to give advice to the Government and frame enactments to be passed by Parliament! Such advice has been found in practice, often, the subject of challenge in the courts. Thus issues of legality of enactments come before the courts. The courts can decide against the legality of an enactment passed by Parliament. By



you must all learn Pushtoo instead of something else and so on and so on. That is the import of the judgment under consideration, to my mind. I am not particularly feeling guilty, that I have not cited before you all those articles—30(a), 32(1) and 133(3) and (4) and all that.

I would, however, like to leave the thought with the conference that the issue is really political. If legislation is required in order to meet not merely the declared ends of social justice and sometimes even in order to cater to the desire for change in the people and may be to keep them less restless and uneasy, the Constitution or its interpretation should not come in the way. Otherwise, as one of our speakers, learned in the law, a former Judge said here, "in the absence of ordered change there will be revolution". It may be asked, why should the courts take into account "revolution", which is not written in the Constitution? It is just because judges in civilised modern societies do not function without social awareness. This would or should apply to the whole problem of law and order. There can be tendencies to revolution in other circumstances as well. If, for example, the law does not allow you to do this, that or the other in order to allay your hunger, there could be consequences following which are not provided by law! These are the things that no Institute of Parliamentary Studies may lose sight of, just because it is not parliamentary or not provided in the Constitution. Social studies, the problem of social action may not be considered in social and economic vacua, in terms of legalisms or extant legal theory alone. We have to recognise the inevitability of change to meet social purposes. That is what Jawaharlal Nehru must have meant when he reminded the Constituent Assembly, "nothing can remain forever".

I end up by saying, if I may say so, without disrespect, that this idea of a fresh constituent assembly to amend some part of the Constitution is neither practicable nor would it solve any problem. No constitution envisages its overthrow or negation and makes provision for it. How is a fresh constituent assembly as suggested to be initiated. If a constituent assembly is initiated by Parliament, it is the creature of Parliament. I suppose a constituent assembly, so convened would naturally be subject to the Executive Government of that day in the sense they will have had the majority in Parliament. That executive would be the dominating factor. Therefore, it is merely going round-about a wasteful circumlocutious process. It does not really mean anything.

As for referendum, there are the same objections to it both in the international as well as in the internal fields. The idea of plebiscites and referenda is one of the devices of people who have the responsibility but who are either unfit or unwilling to shoulder and discharge it. They,

elections. If an election does not throw up an overwhelming majority of opinion in favour of something, then those changes are unlikely to be made. If any changes are so made they can be and perhaps would be challenged at the next election. The social processes go on in that way. The judgments of the Supreme Court are very erudite and they are of great value. They are part of the law of the land. The Government can always get people around them who will often interpret the Constitution as is politically suitable. Modern scientists and modern lawyers are often like the Bishops of the 18th century who provided the doctrine that was required by the monarch. Governments, more often, are able to have at hand the statistics, the theory and the arguments that are politically opportune.

It is always possible for the Government to obtain the backing of the legal opinion which approximates to its choice or its own opinion. Whenever a governmental or government chosen authority gives legal opinion to the Government, it often speaks as though it is the last word. But the last word is not infrequently said afterwards. In the given time if anyone objected to it, the Minister concerned would say: "We have legal authority for this"; it is no use telling us that we have no legal grounds or authority because our legal experts have considered the matter. The test, however, is whether the given opinion is either accepted or acquiesced in by the people or endorsed by the courts, if there is an occasion for judicial review.

The judgment under discussion deals with the issue of the scope of amending power in respect of the Constitution. I take it that the philosophy that we must draw from the judgment that has come up for frequent reference at this conference is that we should go cautiously in dealing with the Constitution. It is the apprehension that one fine morning, when someone in authority does not like something or finds the Constitution being in the way of executive will, a change of the Constitution may be made. I think the present judgment is a check upon such instability. The fundamental problem of government is the inherent conflict between the forces of rigidity on the one side and the forces of progress on the other. The concern of all those who recognise the need and importance of law, order and progress in society is to prevent this stability degenerating into rigidity and the urge for progress becoming restlessness and lawlessness. This has been the problem since there has been representative or any government.

I look upon this judgment, and I feel that ultimately Government will have to look upon it, as saying, 'go easy'. I hope, for example, it will have some effect upon the present language legislation and things of that kind, and that one fine morning they do not rise up and say that

I must say I feel inclined to agree with the view expressed by the majority of the judges in that decision. Take article 368, for instance, which is the article that gives power to Parliament to amend the Constitution. I just heard my friend, Mr. Sen-Verma, speaking about this article. He feels in effect that if a steam-roller interpretation of article 368 is accepted, then, of course every amendment of the Constitution is possible by Parliament. But then we have to read article 368 very carefully and reading it as a whole, what do we find? It is true, as Mr. Sen-Verma pointed out, that it opens with the words that "An amendment of this Constitution may be initiated...in either House of Parliament". It is thus argued that Parliament has the right to amend any part of the Constitution. But if you go to the proviso to that article you are faced with this consideration: Is it that the fundamental rights embodied in Part III of the Constitution are even less important than some of the articles mentioned therein which require additional conditions to be fulfilled in order to amend them. The answer apparently is in the negative. This is very significant. Undoubtedly the fundamental rights play a more important role in the Constitution. Some of the speeches delivered by Founding Fathers at the time when the Constitution was framed indicate that actually they wanted to lay a great deal of importance on these fundamental rights. After all, the historical background, if you take that into consideration, also would justify the inference that the Founding Fathers were anxious that these rights are really rights which belong to any rational and advanced society or individual and, therefore, must be respected and upheld at all cost. They are basic rights under the Constitution not to be tampered with.

I shall come to the question of property right a little later, but I am talking generally of the fundamental rights as a whole. That being so I am quite in agreement with the majority view that fundamental rights were not intended to be affected even by any laws framed under article 368 of the Constitution.

An incidental question which appears to have arisen in connection with the amendment of the Constitution is in regard to the interpretation of article 13(2) of the Constitution. The word 'law' is used in this article. It is said, and perhaps that was the view taken in the earlier decision of the Supreme Court, that the word 'law' does not include constitutional amendments. But there is no good reason why the expression of 'law' should not also include constitutional amendments. As a matter of fact, the legislative process is exactly the same. It is the same Parliament which makes the amendments by virtue of the authority or power which is vouchsafed to it under article 368 of the Constitution. Therefore, if other laws are subject to the scrutiny of the courts and

therefore, cast it upon others. When lawyers, parliamentarians, governmental people, who are full-timers and experts cannot make a decision on a complex problem for which often there is no answer in the form of yes or no, some 250 million people (electors) are to be asked to say 'yes' or 'no' on it between the hours of eight in the morning and six in the evening, i.e., on a day appointed for the purpose. In the international field, since the first world war, on about 27 occasions or so, plebiscites were proposed and only one perhaps succeeded. Only a few of them were brought into the process of implementation or sought to be implemented at all. Only one went through. The idea of a referendum is one of those things with which we ought to go very slow indeed. Some of us were very dubious about the wisdom of even having the public opinion poll which we had in Goa with all its constitutional implications, then and thereafter. That is the reason, perhaps, why the referendum, the 'right of recall' etc. were discussed at the time in the Constituent Assembly and rejected. Elections are not only expensive for Government, they are expensive for other people as well, and a referendum would be no better.

And what would a referendum prove? A referendum would not prove any legality. A referendum would prove which man or group of people puts out the best canvassing effort, which man or group could try and succeed best and which man or group could be most opportunist or respected and so on. If the idea is adopted the whole Constitution would be thrown into the melting pot. As years go on, even our election has become less and less what it was on the first occasion, peaceful, honest or orderly. A referendum which may be expected to generate more heat in a short period and concentrate on one point and partisanship and involve more dubious methods would be even more prone to violence or disorder and lack of finality in the end. Therefore I hope none of us will give too much support to the idea of referenda. It is not that one distrusts the people, but it is that the people do not thereby make a choice in such a matter by that method. The machinery of 'choice' is so large and spread out that it comes under political and personal or group manipulation. There is no real choice as imagined.

This is all that I feel I have to say or present in response to your kind invitation to speak at this conference.

**Sarjoo Prasad:** I wish I had been a silent listener to the various speeches delivered this afternoon on the problem before you. I confess that I have not made a critical study of *Golak Nath's* case and, therefore, I felt incompetent to express any definite view either for or against the decision itself. But speaking for myself, if I may tell you of my own reaction to the relevant provisions of the Constitution,

One objection which is raised at times is this. What about the Directive Principles of State Policy enshrined in Part IV? If you read Parts III and IV together and legislate cautiously, then I think, according to the spirit of the Constitution, the two can be harmonized, unless you want to rush in reforms of all kinds at a time, irrespective of the constitutional mandates. It is possible to give effect to the directive principles of Part IV within the limitations provided by the chapter on fundamental rights. There is no difficulty about it when you come to think of it seriously.

It is said that the Supreme Court's decision puts a complete embargo on the amendment of fundamental rights; therefore, how can you amend? The question is, is it necessary for you to do so? Why is it so necessary for you to do so? If the administration, as a matter of fact wants—and I think it can exercise its discretion so as to bring about the largest good of the largest number—then that objective can also be achieved in my opinion by administrative reforms in different ways, and all within the framework of the Constitution. It is not, therefore, necessary to amend the fundamental rights. I do not see any urgency about it that people should talk of amending the fundamental rights. Why should that be so? Why should we talk about revolution and things of that kind when reforms can come through constitutional channels.

Prof. Tope pointed out certain difficulties and problems that may arise if *Golak Nath's* decision is accepted as good law without amending the Constitution. It is for you to consider whether those problems really and seriously matter. I do not think the problems which Prof. Tope pointed out, for instance in regard to Privy Purses or Princes' privileges or things of that kind, have anything to do with the fundamental rights, and I do not see why the fundamental rights should be affected because of some such problems.

In my opinion, therefore, there is no reason why abridgment of fundamental rights is necessary. I am now talking not as a lawyer but as a citizen of the land. I am as anxious to bring about social reforms and for the introduction of social justice as any of you here may be. But at the same time I feel that instead of rushing through legislation of any variety whatsoever, in which you may ultimately come to grief and which may lead to chaos and disorder, it is desirable and proper that we should proceed cautiously. If that is so, then there is absolutely no necessity whatever for any amendment of any kind, so far as these fundamental rights are concerned. Those who were responsible for drawing the Constitution were men of great wisdom and foresight. They looked into the future as far as human eye could see and visualised the turmoil

subject to the provisions laid down in Part III of the Constitution, then there is no reason why the laws amending the Constitution should not be subject to the same limitations. These are some of the broad points which come to my mind as I look at the problem.

I suppose this afternoon your discussions were to be confined only to the topics of judicial review, *stare decisis*, and prospective overruling; but I found, that except perhaps one speaker who strictly confined himself to the subjects under discussion, most of the other had strayed away from these relevant topics and embarked upon general observations in respect of the correctness or otherwise of the decision of the Supreme Court in *Golak Nath's* case. I am tempted to do the same because, unfortunately I could not take part in the earlier discussions in this Convention.

The importance of the Preamble is necessarily to be emphasised. Either you accept the Constitution as it is, or you do not accept it. If you accept the Constitution then it is obvious that as the Constitution says, the people of India—of course speaking through those who were the Founding Fathers at that time—gave a Constitution unto themselves; and while giving a Constitution unto themselves; they reserved certain fundamental rights which they embodied or enshrined in Part III of the Constitution. That was, I think, their viewpoint; and I am not surprised, therefore, that the Supreme Court took the view that these rights are sacrosanct. I have seen so many people talking about the sanctity of the rights of liberty, of freedom of speech etc. of the individual; when they come to the right of property, they adopt a different attitude. According to a certain section of the people it is thought that this right of property is not sacrosanct and probably it should not have been included in Part III of the Constitution at all. That is entirely a different question; but as it is, as the Constitution stands talking from the legal point of view, there is no reason why the court should not have treated property rights also as embodied in Part III of the Constitution on the same footing as the other fundamental rights and held that they could not be interfered with by Parliament. It is wrong to suggest that either the Supreme Court is supreme or the Parliament is supreme. There can be no such dogmatic assumption. They are all creatures of the Constitution. Neither Parliament is supreme nor is the Supreme Court supreme in that sense. The Supreme Court has got the duty and the privilege of interpreting the Constitution. That privilege has been vouchsafed to it by the Constitution itself, and, therefore, this right of judicial review, which the Supreme Court possesses, cannot be denied to it. In discharging this function, the Supreme Court gives its decision and the Constitution says that will be the law of the land. Therefore, that is the law of the land and there is no gainsaying that fact.

by the same process as other laws. It is in that sense the most flexible Constitution in the world. It has been said that our Constitution is flexible but I hold that the words inflexible and rigid require modifications in the light of what President Lowell describes, as "intermediate constitutions". Perhaps our Constitution belongs to that category.

The question is, on the assumption that the Supreme Court has virtually made it impossible for us to abridge fundamental rights, what we can and what we should do in the immediate present? The view of the Supreme Court is *not entirely untenable* as article 13(2) declares that all laws which are not consistent with the fundamental rights enumerated in Part III are valid. Even if it were, the judgment of the Supreme Court is binding on all authorities who are under an obligation to implement it, as is clear from article 144 of the Constitution. In two earlier judgments the Supreme Court has *over-ruled by a bare majority of one, its earlier decision*. Life changes and even the meaning of words changes in a constitution, as Lord Wright observed, with times. It may be that the judgment of the Supreme Court is incorrect. In fact, I am strongly inclined to the view that the majority judgment of the Supreme Court is incorrect. The question is : what can we do to put matters right?

It is no use referring to the fact that the British Parliament is paramount and that it can do anything that it chooses. In a quasi-federation, and particularly one with fundamental rights, we have to accept the supremacy of the Supreme Court in regard to the interpretation of our Constitution. There are, in my opinion, two ways of getting over the difficulties created by the Supreme Court. In the first place, what the Supreme Court has said is that *fundamental rights cannot be abridged*. They have not ruled out the enlargement of those fundamental rights and we can, therefore, in my opinion, add to the number of fundamental rights and bring some of the directive principles into the category of fundamental rights. In the second place—and I say this in the presence of eminent lawyers who would be shocked by the thesis I am propounding—add to the number of Supreme Court judges. The *maximum strength of the Supreme Court, including the Chief Justice*, has been fixed at 14. We can add 3 more judges. A judge's mind does not work in a vacuum and, as Judge Cardozo says, the unconscious often determines his judgments. If we add, without delay, 3 judges of a progressive outlook, provided we make some verbal changes in article 108 knowing that in so doing, we are exceeding our powers, we may be able to get the judgment reversed by a full court of the Supreme Court. The judgment in *Golak Nath's* case was a full court judgment. The new bench too will have to consist of a full court of the Supreme Court.

and disturbances which were likely to ensue because of conflicting interests in society. You see the effect of those turmoils even now and unless there are some moorings, some sustaining factors, something in the Constitution itself to stabilize society, the country would be faced with a very difficult, dangerous and irretrievable situation.

**P. N. Saprú :** The question for consideration is whether fundamental rights can be amended and if so, how. We have to remember that we have, what Lord Birkenhead would have called, "a controlled Constitution," that is to say, a constitution which is controlled by a written instrument, and which can only be amended in the way indicated in it. There is a distribution of sovereignty in our Constitution and Parliament is sovereign only to the extent indicated in the Constitution itself. Ours is a quasi-federal Constitution and even if we had no fundamental rights the Supreme Court would have been the interpreter of the Constitution.

The interpretation given by the Supreme Court is binding according to article 141 on all courts, and all authorities, whether civil or executive, are required, under article 144, to help in the implementation of the orders and judgments of the Supreme Court. Certain rights have been inserted, which are called fundamental and while restrictions of a reasonable character can be placed on them, they are intended to assure to the citizen those rights which the Founding Fathers thought essential for the maintenance of good life. In addition to fundamental rights we have also Directive Principles of State Policy which, though not binding, are nevertheless necessary for the State to remember in the performance of its multifarious functions.

Provision has been made under article 368 for the amendment of the Constitution and the view taken by a majority of judges in *Golak Nath's* case is that fundamental rights cannot be amended in accordance with the procedure laid down by that article or, for that matter, any other method indicated in the Constitution. The majority looks upon those rights as sacred and inviolable. In a series of lectures delivered to the Calcutta and Agra Universities, I took a different view but it cannot be said that the view taken by the Supreme Court is entirely untenable having regard to the wordings of article 13(2), which declares that all laws inconsistent with the fundamental rights in Part III are invalid. The right to go to the Supreme Court for testing the interpretation of a fundamental right is itself a fundamental right in article 32. It serves, therefore, no useful purpose to compare our Parliament with the British Parliament which has an evolutionary character. Under the British Constitution, laws, whether constitutional or otherwise, can be amended



considerations. From the legal point of view, this question has been discussed, as you know, in three cases by the Supreme Court and it is not necessary for me to go into that matter over again. The only point I want to emphasise is this: If you read article 368 as it is, you will find that when a bill is introduced in Parliament for constitutional amendment and the bill is passed by following the necessary procedure prescribed in article 368 and the bill is presented to the President for assent, and the President gives his assent, the Constitution automatically stands amended in accordance with the terms of the bill. No further steps need be taken. You will please remember the point of time when the particular bill becomes the part of the Constitution. It is at the point of time when the President gives his assent that the Constitution stands amended and when the matter is agitated before a court of law, it is already a part of the Constitution. That being the position, the question arises whether the courts have power to review a constitutional amendment and declare a particular part of the Constitution as invalid. I do not think that the courts have such power. If there are conflicts between the two parts of the Constitution, it is up to the courts to bring about a harmonious construction between the two. But to vest the courts with power to declare as invalid an amendment which has already become part of the Constitution is something to which I cannot possibly agree. If the procedure laid down in article 368 is not followed in a particular case, then certainly it is open to the courts to declare the amendment invalid. If, for example, a particular amendment requires ratification and the ratification has not been made, certainly the courts can interfere. But once the procedure has been followed and the amendment has formed part of the Constitution, then the courts become powerless. This is what I feel so far as judicial review of constitutional amendments is concerned. This question has been discussed over and over again and I do not propose to discuss it further.

I will now consider the political aspect of the question. In order to appreciate whether Parliament should be vested with powers to undertake amendments of fundamental rights, one has to see how Parliament has actually exercised its powers in the past. This becomes important in order to arrive at a political decision of the question whether the courts should or should not have power of judicial review in regard to constitutional amendments. There have been 21 amendments so far. If you analyse these amendments, one after the other, you will find that all of them were absolutely necessary and there was hardly any question of abuse of powers by Parliament. It would not be possible for me to go through all the amendments, as it will take a lot of time. I shall give one example only. Take the very first amendment itself. After the decision in the Patna High Court, what was the position of the Government? They

There is nothing shocking in what I have said. President Roosevelt thought of adding to the number of judges of the Supreme Court when he had to face a difficult situation regarding his "New Deal" but I am not suggesting this addition only or largely on the ground that we want the judgment of the Supreme Court to be reviewed. I think the present situation in which full bench judgments of High Courts of 7 or 9 judges are reversible by benches of three judges or even of two judges of the Supreme Court is, from a juristic point of view, indefensible. In the House of Lords the number of judges is generally 5. So is the case with the Judicial Committee of the Privy Council. In the United States constitutional cases are disposed of by a full court of nine judges. By adding 3 more judges, we shall be improving the quality of justice in our courts and I have no doubt that when reviewing *Golak Nath's* case in a test case, we shall be able to have that judgment reversed.

I shall say just one or two words about the referendum and the constituent assembly. In principle I am not opposed to a referendum but it is difficult to work a system of referendum in a country such as ours. There is no provision for a constituent assembly and a suggestion of this nature indicated by Mr. Justice Hidayatullah, does not, I say with all respect, appeal to me. I am clear in my mind that the only way in which we can get the judgment in *Golak Nath's* case reversed is by adding a few more judges to the Supreme Court.

I emphasize what I said earlier, that there is nothing wrong in adding to the present strength of the Supreme Court. The present system in which full court judgments of High Courts are revisable by three judges of the Supreme Court is completely wrong. We can add, as suggested by Mr. Nath Pai, some words in article 368 but we should not be under the delusion that by doing so we shall have asserted the supremacy of Parliament, for the power of reviewing the Constitution vests in the Supreme Court and the interpretation given by it has the force of law. In a federal constitution or a quasi-federal constitution judicial review cannot be avoided. The judicial review exists in all written constitutions.

**R. C. S. Sarkar :** The subject for discussion this afternoon is judicial review in regard to constitutional amendments. This question may be discussed from two points of view, legal and political. You are all aware that the power of the Supreme Court is derived from article 32 read with article 13(2) and the short point for consideration before us is whether the word 'law' in article 13(2) includes constitutional law or not. The definition of law given in that article does not help. The question whether the word 'law' in article 13 would embrace constitutional amendments also has to be considered in the light of other

**K.V. Rao:** First I will take Sen-Varma's proposition on the power of amending the Constitution. Article 368, as it stands, according to the judgment in *Golak Nath's* case, does not give that power; he has, therefore, suggested that it may be amended by adding one more clause that a constituent assembly should be called, and so on. I do not think it is necessary. As I understand it, all that is required is to add a proviso to article 368 saying that for purposes of this article, the definition of 'State' in article 12 does not apply. In my view that will solve the problem. All the confusion has arisen because of the definition of 'State' in article 12 as applied to article 13. That is a simple thing and is not a big problem.

There are more serious problems to be considered from the political science point of view. I tell you plainly how exactly this interpretation of a constitution should be done, and where exactly the Supreme Court and others should stand. It is a social system and we are functioning in a social system. We are working in a political sub-system of which the legal system is a branch; and if the legal system does not find its own proper place and proportion and work within the social system and the political sub-system, the legal system must be corrected and the judiciary must be told how to interpret the Constitution. To my mind, the difficulty has risen because the lawyers and the judiciary are apt to apply the same old rules and principles of interpretation to everything and at all times. The same rules apply to the interpretation of ordinary law as well as a constitution; and thus you are not able to understand the significance of a constitution.

The Constitution is not a mere legal document containing words to be interpreted in terms of grammar, full-stop and comma. You are dealing with a document that represents the political culture of a country; and before you interpret it, please understand that you are to interpret it in terms of the political culture, and not take into consideration extraneous elements and try to misinterpret it. I may tell you, many of the amendments that have been passed by Parliament are called for because the courts have given such judgments which have no connection with the political culture of the country as depicted in the Constitution.

Take a simple example: Article 19(1)(a), as it stood then in 1950, was so interpreted as not to cover incitement to murder or to setting fire to houses. A misdirected interpretation alone could result in this kind of meaning and Parliament was compelled to amend the article.

Similarly, in 1950 when we had the judgment in *Gopalan's* case—I am talking to the lawyers and the judiciary—did you understand the spirit in which the Constitution had been made? It was said then: we are not concerned with the Constituent Assembly proceedings; we do not take them into cognizance at all; we do not read them at all,

**K. V. Rao:** That is exactly what I told you in the beginning: you always apply old and antiquated rules of interpretation to the Constitution. There was another argument long ago that they were not concerned with hypothetical cases. But that is not the reason here. The simple answer is that our Constitution allows only "an opinion" to be given by the Supreme Court. Even when the procedure is the same, it is not considered a judgment or binding law just because it is distinctly so said in the Constitution. Similarly the Constitution does not call the constitution amendment 'law' at all. Consequently, there is no meaning in calling it a law first, and then implying that for purposes of article 13(2) also it is a 'law'. For purposes of article 21, law means 'statutory law' but not 'constitutional law' for the courts (vide *Golak Nath's case*) whereas for purposes of article 13 (2) law means constitutional law also (vide *Golak Nath's case*). The meaning of the 'law' thus is a matter of opinion. If the opinion of one court is like that, the opinion of a subsequent court may be different at some other time. It is all upsetting the constitutional order by judicial fiat.

Again, take prospective over-ruling. It means that whatever mischief has been done stays, but in future the law does not apply. That is all right. But does the Supreme Court apply it in that way in *Golak Nath's case*? This ruling means that all the amendments have been in order till February 27, 1957. Prospective over-ruling says *ex tunc* the law is dead but because something has been done already under the law, the Court will not rule that out and undo the mischief already done but allows it to stay. That is all right; but here the judgment in *Golak Nath's case* allows the amendments to stay. The Constitution nowhere confers power on the Supreme Court to say that an unconstitutional act will still continue? How can amendments which have been proved to be absolutely unconstitutional, be made constitutional?

**A member:** Parliament can do it.

**K.V. Rao:** I have one more point. I do not prefer the Supreme Court to tell me that I am to live under an 'unconstitutional Constitution'. It is for my representatives to say under what Constitution I have to work. If the Supreme Court is given this kind of power, it is certainly rewriting the Constitution. What power has it got to rewrite the Constitution?

If the Supreme Court begins to rewrite the Constitution in this way, we would soon be transferring the Crown from James I to the Supreme Court, forgetting completely about 300 years of struggle for democratic form of Government.

**H. N. Kunzru:** What I have been asked to clarify is the position that was taken up by the Constituent Assembly regarding the amendment of the Constitution. Every article of the Constitution was discussed

but interpret the Constitution as it is and every word of it; we are not concerned with anything extraneous to the language of the Constitution. Is this the way of interpreting a constitution? As a layman, a political scientist and a social scientist, I am not concerned with your legal interpretations alone for understanding the Constitution. There are other ways.

At least one previous judge has warned the Court about that type of interpretation. Speaking of the way in which the Government of India Act, 1935, should be interpreted, he exhorted the other judges to remember that they were interpreting "a Constitution". The lawyers and judges in general are all accustomed to deal with ordinary law to a great extent; and very unconsciously, they have taken for granted that a Constitution also is an ordinary legislative enactment. That could in a way be said of the 1935 Act and the 1919 Act, as they were, in fact, acts of the Parliament of England. But there is no justification for saying that the present Constitution is a legislative enactment, because nowhere in the Constitution is it said that it is an Act. It is the Constitution proper, and is not a mere document of constitutional law. This distinction is of paramount importance; but by revolutionary interpretations, this distinction is being obliterated. The first coup in constitutional history took place when John Marshall, Chief Justice of the U. S. Supreme Court, gave judgment saying that the 'Constitution' is 'constitutional law' and because it was 'law', the court had the power to interpret it.

The second coup has been staged by our Supreme Court when the Court equated this constitutional law with ordinary law. A number of books have been written on this subject and every author has referred to constitutional law as different from ordinary law; and this is the first time for me to hear, as a teacher of political science teaching constitutions for the past several years, that 'constitutional law' is 'ordinary law'. Why? Because in India, as the Court has said in *Golaknath's* case, the same procedure is applied in enacting both, and the same body, Parliament, passes both. Consequently it is ordinary law.

I would put a rejoinder. Why is it said that Advisory Opinion of the Supreme Court, under article 143 is not a "decision", and, therefore, not a binding law? There also the proceedings are the same as those of a litigation case; a defence is made, lawyers argue, and everything else also is judicial procedure. But does it become a judgment of the Supreme Court, binding on all of us? It does not. Why?

**A Member:** One difference is here that there is no real case before the Court with regard to the initial reference under article 143. There are no contending two parties.

ever raised an objection on the plea that the abridgment of the fundamental rights by way of amending the Constitution was never contemplated. I was amused to read an opinion by Acharya Kripalani and Dr. Munshi saying now to the contrary. Therefore, our understanding all along had been that Part III is also subject to amendment to the same extent as other articles are amendable under article 368. The judgment of the Supreme Court in *Golaknath's* case came to us as a surprise and a shock.

I come to another aspect to which Mr. Hajarnavis drew our attention. He has been emphasizing that Parliament or the Government of India, has been getting into panic whenever there is a judgment of the Supreme Court or the High Court; and in panic they have been introducing unnecessary amendments in the Constitution for abridging the fundamental rights. He was, as a matter of fact, more sore about the seventeenth amendment which took out about 44 State Acts from the review of the Court. I was a member of Parliament when the amendment was introduced. It was not passed in a huff or in a hurry because competent legal opinion was consulted on the amendment. I personally had a discussion with the then Advocate General of Madras, Mr. Thiruvengkatachari, one of the most erudite lawyers I have come across, and a man of very sound judgment. He was one of those who suggested that instead of making an amendment in the article, it is better to incorporate all the Acts which are sought to be protected. I remember he referred to me a precedent in some constitution—Ireland or some other country—to show that there was such a situation in that country also. As a result of this, certain Acts were put in the Constitution itself and made beyond the purview of judicial review. It has been rightly pointed out by Mr. Sarkar that the original idea was to give protection to 132 Acts. But the question was considered thoroughly. The documents and records of the proceedings of the Joint Committee of both the Houses ran into more than 1,000 pages. It is a voluminous proceedings consuming several months of labour. It was not only the Government of India, but all the State Governments that were anxious to put through land reforms and land legislation. They were of the same mind. Because of the collective and unanimous opinion of all the State Governments and the Government of India, after a very careful review of the whole situation and after obtaining competent legal opinion, this amendment was made and the number of Acts which were sought to be protected was reduced from 132 to 44. Therefore, it is my opinion that, it is rather unfair and harsh to say that Parliament of India or the Government of India have been rushing through, incorporating, or passing constitutional amendments in a hurry and under certain pressures.

there. I frankly do not remember the depth of sanctity attached to article 13 which is now being attached to it either by the courts or by some lawyers or other people. We all discussed them in the Constituent Assembly. When article 368 was passed I do not think anybody ever thought that this article would apply to the whole Constitution, except the chapter on fundamental rights. There is nothing to show that in the records of the Constituent Assembly. They are amendable. As regards the referendum, I believe only Professor K. T. Shah referred to it and took the initiative as well. But his view was not accepted by the Constituent Assembly. Consequently the whole of the Constitution was made in accordance with the British and the American precedents. Within a year of the coming into force of the Constitution an Act was brought forward before the very same body functioning as Provisional Parliament to amend certain articles of the Constitution which form part of Part III of the Constitution. Keeping this factor in view either you have to agree that the Founding Fathers did not read into article 13(2) what is being read into it now, or that they forgot at that time the assurances that they had given while framing articles relating to the fundamental rights. If the latter hypothesis was true at least the members of the opposition in the Provisional Parliament could have pointed that out taking objection to the Amendment Bill abridging fundamental rights. But I do not remember that any objection was taken to it by anybody. It did not occur to anybody to say that the prohibition in clause 2 of article 13 applied to all constitutional amendments which take away or abridge fundamental rights. If this was the understanding of the members of the Constituent Assembly who afterwards became members of the Provisional Parliament, remained in power for two years and enacted the First Constitution Amendment Act, I think it will be rash on the part of anybody to say that the Constituent Assembly meant that a certain part of the Constitution should be beyond the power of Parliament to amend. Article 368 is a perfectly general article which empowers Parliament to amend each and every article of the Constitution including the fundamental rights.

**B. K. P. Sinha:** Even though I was not a member of the Constituent Assembly I became a member of the Provisional Parliament on January 26, 1950, the date on which the Constitution came into force. Really, I am of the same view as that of Pandit Kunzru. The Constitution was amended several times. All the members of the Drafting Committee, Dr. Ambedkar, T. T. Krishnamachari, Dr. Munshi, Alladi Krishnaswamy Aiyar were the members of the Provisional Parliament which passed the Constitution First Amendment Bill abridging fundamental rights. But whenever the question of amendment of the Constitution for abridging the fundamental rights arose, none of them

## Third Business Session

**Subject :** Amendability of the Constitution under judgment of the Supreme Court and steps, if any, to be taken to overcome the difficulties.

**Chairman :** Mr. M.C. Setalvad, M.P.

**Rapporteur :** Professor P.K. Tripathi.

**M.C. Setalvad :** Dr. L.M. Singhvi will tell us very succinctly about the proceedings of yesterday so that we may follow the discussion proper.

**L.M. Singhvi :** The discussion yesterday was confined to the quality and content of constitutional amendments, the place of fundamental rights in the Constitution, the scope of judicial review and the doctrines of *stare decisis*, prospective overruling and acquiescence.

Today, after having discussed various aspects of *Golaknath's* judgment threadbare, we should confine ourselves—and it is proposed that the scope of the discussions today is as severely and rigorously limited as possible—to take into consideration the various alternatives which have been thrown up seriously on *Golaknath's* case. Even the majority view of the five judges for whom Chief Justice Subba Rao spoke, have conceded that there is possibility, though they have not finally ruled in the matter, of attempting an amendment through a constituent assembly. Mr. Justice Hidayatullah has been more specific and explicit in this connection. Therefore, it would not be correct to say that these six judges did not contemplate any amendment of the Constitution in whatever way.

We have before us, therefore, a wide range of complicating, competing and complementary choices. Some new choices and suggestions have been thrown up in the course of discussions since Friday evening. They relate to a re-definition of the doctrine of *stare decisis* in the context of our Constitution, for example that there should be a special majority in the Supreme Court when it wishes to give constitutional interpretations on certain vital issues, and that in certain matters, as Mr. S. K. Das put it, if the Attorney General certifies the matter to be of great constitu-



**V. G. Ramachandran:** Mr. Krishna Menon was pleased to observe that judicial review was a mere process. I beg to submit it is not so. It is a real substantive right available to the people whose rights have been invaded. Judicial review not only reveals the law but also has to declare and make law when necessity demands it as in *Golaknath's* case. To say lightly that Parliament will go on with amendments despite Courts' ruling is to ignore the constitutional mandate contained in article 144 which enjoins all State authorities to go in aid of the Supreme Court. It is the Constitution that is supreme and not the three wings of Government, which can exercise only what may be called partial sovereignty within the restrictions placed on them by the provisions of the Constitution.

The doctrine of prospective overruling has been criticised as foreign. But there is nothing in the Constitution that prohibits it. In *Golaknath's* case, the impugned first, fourth and seventeenth amendments have not been struck down by this doctrine and so article 13 is in no way offended. Even in England, the latest decision of the House of Lords in 1966<sup>1</sup> lends support to the prospective overruling doctrine. It envisages that a strict adherence of *stare decisis* is archaic and that the highest court of the land can depart from a previous decision when it appears right to do so, without disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have already been entered into. Criminal law is also therein excepted. Prospective overruling was used judiciously in *Golaknath's* case to uphold the rights of people in Part III of the Constitution.

1. See *London Tramways Case* (1966) 1 W.L.R. 124.

These are the suggestions which have been thrown up in the course of discussions in the last three sessions.

**M.C. Setalvad :** May I make one observation? Today's discussion, it appears to me, will proceed on the assumption that a situation is being created by *Golaknath's* judgment which requires a remedy and the remedy suggested, so far I can see, fall into two parts: one is taking some steps which will make Parliament's power to amend the Constitution including Part III as absolute; and the second refers to a cockneyed subject, namely, is it necessary to lay down some modified procedure in the Supreme Court when it deals with important constitutional questions, so that we should not be faced, we have been by a judgment so narrowly divided by 6 to 5 in such an important matter. I request you to concentrate on these two aspects of the matter.

**H.N. Kunzru:** In the Constituent Assembly we were under the impression that under article 368 we could change the Constitution in any manner we liked and that those piloted the draft article 304 through the Constituent Assembly were also of the same opinion. But now we have been told by the majority judgment of the Supreme Court that it is not so and that while the procedure for amending the Constitution has been clearly laid down, the power to amend the Constitution inferred from certain provisions of the Act. It is a reading by implication as nowhere in the Constitution it is so stated. In these circumstances, we have to see how Parliament may regain the power which we thought it possessed. One suggestion is that a test case should be brought before the Supreme Court in order to find out whether the Supreme Court changes its opinion or adheres to the one that has already been expressed. If that is done, ten of the existing judges will be those who have already expressed their opinion. If, therefore, we are to have a clear expression of opinion on this point, there must be some other judges added to the court who have not committed themselves to one view or the other and I understand that it is possible to have 13 judges in the Supreme Court. In that case it will be desirable to have the full strength of the Supreme Court in order to decide this matter.

Secondly, suppose this method fails and the Supreme Court adheres to the opinion expressed by the majority party. What is to be done then? Well the majority judgment, that is the judgment of Chief Justice, Mr. Subba Rao, and four other judges, says it is by the use of these implied powers of Parliament under articles 245 and 246 of the Constitution, read with entry 97 of List I in the Seventh Schedule you can convene a constituent assembly again, but they are careful enough to say that they do not express any final opinion on this point. Only Mr. Justice Hidayatullah is sure that this is the correct method of dealing with the

tional importance, the Chief Justices of certain High Courts, or all High Courts should also be called upon to participate in the process of interpreting the Constitution at the apex of our judiciary.

There are other suggestions outlined in the Working Paper of the Institute to which I would particularly draw your attention. It has been mentioned there that it is for your consideration as to what the composition of the machinery and the manner of carrying the amendment by the constituent assembly, or convention or referendum or initiative should be. It is also mentioned there that whenever the Court deliberately pronounces a value judgment, interpreting the Constitution, it should not subsequently disturb the order so established even though there might be other logical reasons suggesting a contrary view and that since its pronouncements affect the entire constitutional order, it should not impose certain limitations on its absolute discretion in declaring the law, interpreting the Constitution and passing any order to do complete justice in the pending cause or matter. This of course was also the subject matter of discussion yesterday in the evening.

The other suggestions have been:

- (1) that for establishing constitutional order and stability in judicial system a decision by two-thirds or three-fourths majority of the Courts should be insisted upon;
- (2) that if it is assumed that the principle in *Golaknath's* case is not acceptable then Parliament may amend article 368 so as to lay down therein that Parliament has the power to clearly amend all the articles of the Constitution, including fundamental rights notwithstanding anything said in the other parts of the Constitution. This is also the tenor of Mr. Nath Pai's Bill which has been referred to the Joint Committee of the two Houses of our Parliament.
- (3) that it is open for the Court to review its judgment in *Golaknath's* case and that we need not be panicked but give enough time for the Court itself to reconsider and review and revise its opinion in *Golaknath's* case;
- (4) that the Supreme Court be packed or its strength increased in order to get a revised decision from it;
- (5) that Reference for an advisory opinion of the Supreme Court be resorted to; and
- (6) that fundamental rights should be made entrenched provisions of the Constitution so as to require for any constitutional amendment affecting fundamental rights the same kind of procedure which is contemplated in the proviso to article 368.

bind all courts unless it is reversed. We have, therefore, to consider what steps should be taken to remove the difficulty created by the judgment.

If you consider that the fundamental rights are so fundamental that, even if they are frozen at this stage, no difficulties will arise in carrying out our social and economic policies, I suggest that no further steps need be taken. But you cannot have frozen rights in an ever-changing society. When we undertake legislation for progressive economic or social reforms, fundamental rights should not be allowed to stand in the way and occasions must necessarily arise for the amendment of the fundamental rights.

We must, therefore, have a clear picture of what we want to achieve. I am not one of those who believe that the fundamental rights are natural rights. I am not also one of those who believe that fundamental rights are immutable. I am not also one of those who believe that fundamental rights were reserved by the people to themselves. It is a wrong conception. After all, it was the Constituent Assembly which framed the Constitution and people had very little part to play in it. It was the Constituent Assembly which reserved certain rights or granted certain rights to the people. It is not the other way round. There is no doubt in my mind that such fundamental rights require amendment. I do not, however, minimise the importance of fundamental rights. Though I disagree with the majority judgment of the Supreme Court, I think that it has done a very useful service. It has underlined the importance of fundamental rights in the life of the community. It has aroused the interest of the common man to a constitutional question of far-reaching importance about the desirability of amending fundamental rights. To that extent, the Supreme Court judgment has served a useful purpose.

Our object, therefore, should be to provide for some machinery for amendment of fundamental rights. But at the same time we must ensure that these rights are not lightly touched. We must provide for adequate safeguards against hasty amendment of fundamental rights. The question arises how we may achieve this objective. This is what I propose to discuss.

The first suggestion is that when we propose to amend any fundamental right, a constituent assembly should be convened for the purpose. This suggestion has been thrown out by the Supreme Court itself. It is, however, beset with difficulties. In the first place, there are difficulties in convening a constituent assembly. It cannot be done by Parliamentary legislation because Parliament would not be able to do anything indirectly which it could not do directly. Secondly, Parliament itself being a constituted body, it cannot create a constituent body.

matter. This means that since there is a doubt about the matter it will have to be referred to the Supreme Court for an expression of its opinion. I need not say how that is to be done. That is all known to you. But in order to avoid all possible mistakes and to know which is the best method of restoring to Parliament the power that we thought it possess we should ask for the opinion of the Supreme Court.

Thirdly, we have been asked whether it would be desirable to lay down a special procedure when the Supreme Court considers constitutional matters. Will it be desirable to lay down that a majority of one should not be sufficient to change a decision already arrived at? I suppose anything can be done, but I do not know whether this will be as simple as it is thought to be. Next, will not a demand arise that since a judgment of the Supreme Court may carry greater weight with the people, even other issues, which are of an important character, though not constitutional, should be dealt through the instrumentality of the court?

These and other questions arise and the matter will, therefore, have to be considered very carefully before we pronounce any definite opinion on the subject. For the time being, it seems to me that we have only two methods open to us:

- (1) To bring a test case before the Supreme Court and see whether the Supreme Court is prepared to change its opinion, as the Supreme Court of the United States have done on many occasions; and
- (2) To ask the Supreme Court, if this method fails, what would be the best way of dealing with this matter, so that Parliament can get back the power which the founders of the Constitution thought it possesses.

**R. C. S. Sarkar:** The subject for discussion this morning is amendability of the Constitution in view of *Golaknath's* case and the steps which should be taken to overcome the difficulty. The recent trend of the decisions of the Supreme Court is rather disturbing and the judgment in *Golaknath's* case is perhaps the most controversial judgment ever delivered by the Supreme Court during the last 17 years of its existence. For the last two days we have discussed this judgment from various angles. Though there has been a conflict of opinion among the members of the Convention, the general feeling is that the judgment is clearly wrong and productive of greatest mischief. But nonetheless, it is the declared law under article 141 of the Constitution. It is not the law of the land as sometimes it has been loosely put. But it is certainly a law binding on all Courts in India. It is no good discussing the merits and demerits of this judgment because this judgment will continue to

Thirdly, apart from legal considerations, there are many practical difficulties in convening a constituent assembly. If, for example, we want to have a minor amendment in article 19(2), it will not be an easy task to go through the paraphernalia of convening a constituent assembly. The amount of time and labour involved will not be worth the trouble and you are not going to get a body which will be more representative than Parliament which is based on adult franchise. So the idea of a constituent assembly has to be rejected both on legal as also on political considerations.

The next suggestion which has been made is that there should be a reference to the Supreme Court for its advisory opinion. I really do not understand what the scope of that reference should be. The reference might be on two questions : firstly, a review of the judgment. To my mind this is not possible because an advisory opinion cannot override a judgment of the Court. The other suggestion is to seek the advice of the Supreme Court as to the methods by which constitutional amendments of the fundamental rights may be made. To my mind, such a reference also should not be made. This is a political question and must be decided by the Government and Parliament and not by the judiciary. Therefore, the idea of making a reference to the Supreme Court for its advisory opinion does not appeal to me at all.

Another suggestion has been made that there should be referendum. Apart from the practical difficulties in referring a particular question to 250 million electorate, there are other difficulties also. In a small country like Switzerland, a referendum might work well. In a small place like Goa where there was a limited question, referendum had been possible. But when you are dealing with 250 million people and seek their opinion on complicated questions of constitutional law, it will not work at all. I do not think that referendum is an answer to our problem.

Another suggestion has been made that article 145(5) should be suitably amended so that a marginal judge might not upset the established law. This idea also does not appeal to me. It is not going to undo what has already been done in the past.

In the absence of any suitable alternative machinery for amendment of fundamental rights, it will be necessary to vest the power in Parliament itself. I do not find anything wrong in vesting Parliament with those powers. After all, it is the most representative body responsible to the bar of public opinion and there is nothing wrong in vesting Parliament with these powers. But at the same time, in order that Parliament might not act hastily, certain restrictions have to be put on its power in relation to the amendment of fundamental rights. During the last 17

years or so, we have already amended fundamental rights to suit our needs and it will not be necessary to move with unnecessary haste with regard to this matter. You are aware that Mr. Nath Pai introduced a Bill in Parliament on the subject and it is still pending. The object of the Bill is to vest Parliament with powers to amend fundamental rights. I entirely agree with the object of the Bill. But the Bill as drafted does not provide for necessary safeguards against hasty legislation by Parliament. Moreover, a unilateral declaration by Parliament that it has power to amend the Constitution may bring Parliament and the judiciary into conflict and this will not be a healthy thing to do. The Bill as drafted may also be struck down by the Supreme Court in view of its decision in *Golak Nath's* case.

While I fully agree with Mr. Nath Pai that in order to achieve the object in view, article 368 should be amended, I suggest that the amendment should be more comprehensive. In the first place, a specific provision should be made that while Parliament exercises its powers under article 368, it should function as a constituent body. It should also be made clear that article 368 is a self-contained code, that is to say, it should cover both substantive law as also procedural law. These are not novel ideas. This was the intention of the Constitution-makers. You may remember that the Constituent Assembly was functioning in two capacities, as a Constituent Assembly as well as a legislative body. The Constitution-makers felt that while Parliament will exercise power under article 368, it would function as a constituent body, but the distinction between the constituent powers of Parliament and the ordinary powers of Parliament have been overlooked by the Supreme Court. This aspect was, however, very well brought out by Mr. Justice Wanchoo in his judgment. All that I suggest is that specific provision should be made to give effect to the views of Mr. Justice Wanchoo by suitable amendment of article 368.

Secondly, in order to provide safeguards against hasty legislation, provision should be made that any amendment of fundamental rights would require ratification by the States. This suggestion was made by Mr. Justice Gajendragadkar in *Sajjan Singh's* case. The Government did not act on that advice and if they did, things would perhaps have been different today. We should give effect to that suggestion by including Part III in the proviso to article 368.

Even with these amendments, the validity of the law would not be free from doubt. We should, therefore, proceed cautiously and Parliament should exercise its powers under article 368 only in exceptional cases. I suggest that Parliament should, to start with, amend certain articles of the Constitution which will not have a direct impact on funda-

convention, if not an amendment of the Constitution, should be established for ensuring a minimum period for which the Chief Justices of the High Courts or at least the Chief Justice of the Supreme Court should hold office. If the Chief Justice is there only for a few months I would not say that he would become less responsible, but if he were there for a longer period he would try to develop a consistent philosophy of jurisprudence of his own. He would try to work it through a number of cases and he would try to influence judicial opinion and thinking in the country in a constructive way or at least in a way which he thinks is good. If that sort of thing can be brought about it would be good. I just looked into the 165 years' record of the Supreme Court of the U.S.A. There have been only 14 Chief Justices of the Supreme Court, and in India in the last 17 years we have had 8 Chief Justices.

With a view to make the position clear I would suggest that we should at the earliest opportunity amend the Constitution so that the power to amend the Constitution including Part III is restored to Parliament, because the whole set-up and scheme of our Constitution envisaged a type of judiciary appointed in a particular way which is rather rigid and selective and irremovable judiciary—as Mr. Rao called it—and at the same time gave certain powers to Parliament as the chosen representatives of the people. It was never intended to give the judiciary that much power as to counterbalance the powers given to the Parliament. In effect the judgment has disturbed the whole constitutional set-up, as such it needs to be restored as early as possible. This can only be done, to my mind, by amendment of the Constitution.

As regards the requirement of the two-thirds majority of the Court for interpreting the Constitution, I do not think that will be the right thing to do. Even the suggestion of convening a constituent assembly, as made in the judgment itself, would not be free from doubt. If such a body is convened today it would have almost the same political complexion as the present Parliament. It would not be imperative for the Constituent Assembly to take decisions by a two-thirds majority, as the present Parliament has to, in order to amend the Constitution. So in my opinion the present provisions contained in article 368 give greater security for upholding the fundamental rights in the Constitution and for implementing the purpose of this judgment than the suggestion of convening a new constituent assembly which might work on a simple majority principle.

The only way for the controversy to set at rest and the judiciary to know the scope of its power of judicial review is an amendment of the Constitution making it clear that Parliament has absolute power to amend the Constitution including Part III.



mental rights but only an indirect impact. I have article 359 in my mind. If emergency is lifted, it might be necessary to amend article 359 and that will give an opportunity to the Supreme Court to review its own judgment. Later on, we may undertake amendment of fundamental rights only when it is a 'must'.

I realise that if article 368 is amended in the way suggested by me, even then the validity of the amendment would not be completely free from doubt. But it will have the effect of vesting Parliament with powers to amend fundamental rights and, at the same time, there will be adequate safeguards against hasty legislation. It would also go a long way to meet some of the objections of the Supreme Court and would give an opportunity to the Supreme Court to review its own judgment.

**R. N. Mirdha:** The subject that we have been discussing since yesterday deals with a very important matter. *Golaknath's* case has been a subject of great controversy so much that unpleasant epithets have been hurled on this decision by the highest judicial tribunal of our country. One could very well have wished that this sort of situation had not arisen and that whatever our Supreme Court ruled was accepted by the generality of public in the right spirit. But the subject matter of the judgment is such that there is bound to be a strong reaction. Firstly, it has upset a judicial situation that existed in our country for quite a few years leading us to believe that judicial opinion in the sphere of fundamental rights and the power to amend the Constitution by Parliament were more or less well established. Therefore, this judgment has come as a jolt. We must clarify the whole situation at the earliest opportunity, so that this confusion may not continue and the Supreme Court is not subject to the type of criticism which is being made at present. I think the best way to do it would be to amend the relevant articles of the Constitution, so that any ambiguity in the matter would be set at rest. Some one had suggested that we should wait for a test case to go to the Supreme Court, so that the Court could review its own judgment. Well, this would be in a way asking the Court or offering it an opportunity, if not an inducement, to change its judgment so soon after the judgment is pronounced. I think we should not wait for that. Actually we have been emboldened to think in those lines because of certain inconsistencies in the judgments of the Supreme Court. I would like to say a few words as to why it has happened.

If you see the tenure of the judges in the High Courts and the Supreme Court, it has been much too short. I would not go to the method by which they are appointed and if there could be a change in the method, for example, whether we could bring in some eminent jurists for which there is a provision in the Constitution. At least some

amend the fundamental rights provisions in the Constitution. A Parliament works on a party system. So when they do not give any party a two-thirds majority, it may be considered that some sort of veto has been given by the people to future constitutional amendments.

The next point I come to is a very important one and that is: Why this Convention is so anxious to repose the power of amendment in the Parliament? In the present context, is such a power of amendment absolutely necessary? Could this matter not be taken up along with the next General Election when a specific question on this point may be asked to the voters? This question was not directly put to the voters during the last elections. Parliament has been elected to discharge normal legislative functions and not to amend the Constitution.

Further the only controversial clause mentioned during the debate related to property rights. This point was highlighted by Justice Hidayatullah in his opening remarks and later on by Mr. Setalvad. My point is, if this is the only controversial provision in the fundamental chapter, these rights have been considerably whittled down by series of amendments to the Constitution and really there is no further practical necessity to make an issue of this matter till the next elections.

An analysis of the constitutional amendments will show that no attempt has been made by the Parliament to consider objectively the area of restriction required on the fundamental rights. On the other hand, in the various amending acts, certain enactments have been mentioned in the schedule which are immunised from the attacks on the ground of constitutional invalidity. Such immunisation of selected pieces of legislation cannot be termed as amendment of the Constitution. This is something far more arbitrary. It is for consideration whether such haphazard and artificial restrictions on fundamental rights should be allowed to be made by Parliament which has been primarily elected to carry on legislative activities under the Constitution.

So my suggestion is that the decision in the *Golaknath* case should be followed so long as it is the law of the land. That decision says, rightly or wrongly, that a constituent assembly can be convened by Parliament for abridging the fundamental rights. Five judges have given indications of that point of view and one judge has definitely stated that this is the only means available. This means it is the dicta of the Court and in the absence of anything else it is the only method that can be legally followed to achieve this objective and it is wrong to proceed with the amendment of article 368 so as to whittle down Part III or article 13(2). We might wait for a suitable opportunity so that a constituent assembly can be properly convened. There is really no hurry for this because accord-

**M. C. Setalvad:** May I make a suggestion which future speakers may consider? If they start with speaking their conclusions as to the methods and then give the reasons we might be too briefer.

**C. B. Pai:** The dicta of the majority judgment in *Golaknath's* case is the law of the land. No useful purpose will be served by suggesting amendments to the fundamental rights provisions in the Constitution so long as that judgment subsists. The only way the Constitution can be amended is by following the majority view of the Supreme Court, i.e., to convene a constituent assembly or to seek a referendum. There is no point in suggesting that Parliament can make a law by which it will indirectly amend Part III. So my suggestion would either be to convene a constituent assembly or to refer the entire issue to the country in a referendum. The issue to be referred to the country and the electorate can be specific and should be stated in simple terms.

**M. C. Setalvad :** What is the procedure?

**C. B. Pai :** I will come to that presently. Viewed from the fundamental juristic principle the sovereignty in a democracy vests ultimately in the people. If this principle is accepted the procedural difficulties should not stand in the way of translating the will of the people into law. A procedure should be evolved to meet the needs of the situation. If there is difficulty in convening a constituent assembly the alternative of a referendum can be thought of.

The virtue of seeking a referendum is that the voters would get the right to say 'yes' or 'no'. Judging from the immediate past the chances are that the voters will not give an unfettered right to the elected members to amend the Constitution. I say this because they have even now impliedly negated this right. It may be that they are dissatisfied with the series of constitutional amendments that have been passed in Parliament. That is why they have not returned a single party with a two-thirds majority to the Parliament. Under a democratic system with party rule, the fact that the voters have not returned a single party capable of amending the Constitution, which they have done so far, clearly indicates that the voters have expressed their dissatisfaction with these amendments. Yesterday, one speaker suggested that the voters have given a mandate after the Supreme Court's decision or contemporaneously that the Constitution may be amended by electing a new Parliament. That suggestion is not correct. On the other hand, as I have already stated, voting public in India who are after all the final repositories of power in this country have definitely negated the Parliament's right to amend the Constitution. They have not given any party a majority which means they have not given power to the present Parliament to

about only by another constituent assembly. If we are sticking to the law, as it exists today, then we must abide by the law laid down by the Constituent Assembly and embodied in the Constitution which is contained in article 368. So I suggest that all the talk which has been going on for such a long time for calling a constituent assembly to change the Constitution is academic and has no relevance whatsoever to the Indian Constitution and the Indian circumstances.

Apart from this, there are practical difficulties involved in this suggestion. If a constituent assembly has to be called, it has to be by adult franchise. So it is the same thing as Parliament elected on adult franchise. What is going to be the distinction between that constituent assembly and Parliament? How long will the constituent assembly sit? Would it be possible to restrict its business? What would be its relation to Parliament? And what would be the expenditure involved in that process? And there would be a spate of legal arguments and differences that are bound to confuse the people. Let us not forget that there are also other difficulties, apart from the fact that the public will find it very difficult to understand various arguments, many of which would be legal, involved in changing the Constitution.

The Constituent Assembly itself functioned simultaneously as Parliament whenever it discharged ordinary legislative functions. As such there is no point in saying that there should be a special constituent assembly different from Parliament. Parliament itself, if I may suggest, is a body entrusted by the Constitution for changing the Constitution. What I would only say is this: that Parliament may, whenever it wants to change the Constitution, instead of adopting the procedure applicable for enacting ordinary laws, should adopt a special procedure to make conspicuously and visibly clear that in doing so it is acting as a constituent assembly. In this connection, I would suggest that when Government or anybody else wants to bring about a change in the Constitution, instead of taking it up in the course of ordinary legislative business, Parliament by a resolution should declare that it is now converting itself into a constituent assembly. Having done that it must have special rules and procedures to function as a constituent assembly. I would even go to the length of suggesting that it should have a special President when it meets as a constituent assembly, so that everybody will know that it is acting in a distinct capacity.

**M. C. Setalvad:** By what power would you constitute such a constituent assembly?

**V. K. R. V. Rao:** By a resolution of Parliament. The whole idea is that Parliament should create an image before the country that it is

ing to me even the existing provisions of the Constitution are sufficient as the Seventeenth Amendment has not been struck down *ab initio* but only prospectively. Article 31A practically strips the property rights and the fundamental rights are limited to that extent. That fundamental right is the most controversial one.

There is enough scope for balancing the various fundamental rights found in the Constitution to advance the objectives of a welfare state. Many a time the Supreme Court has invoked the directive principles in article 43 in the context of ameliorative legislation, like labour legislation, and have given a liberal interpretation to all social legislation. The prime necessity is good and careful draftsmanship of legislation.

If you take the first, fourth and seventeenth amendments you would notice that these enactments have not sought to amend the fundamental rights but to arbitrarily immunise them from a challenge in the courts. That is not the way to deal with the situation. If Parliament wanted to amend fundamental rights it should have done it by concerned provisions so that a person knows what his rights are.

In conclusion I urge that the *Golaknath* decision should be accepted as it stands and advantage should be taken of it to convene a constituent assembly at an appropriate time and this could easily wait till the next General Election when these matters can be put before the voters fairly and squarely.

**V. K. R. V. Rao:** I will begin by saying that there is no question of a constitution binding all coming generations. There must be provision for change. Fundamental rights, however sacred they are, must also be subject to change like other parts of the Constitution. No one generation can bind down the conduct or behaviour of all the succeeding generations. If any attempt is made to do that, the only result will be that changes will be brought about outside the law if it is made impossible to bring them within the law. Therefore, I think it is essential that the Constitution itself provide for its own adaptation to the changing circumstances without excepting any Part.

Secondly, a suggestion has been made that this could be done by convening a constituent assembly. But we must remember that the Constituent Assembly which framed our Constitution has made no provision for calling another constituent assembly. Article 368 is the only article that pertains to changes in the Constitution and that article makes no reference to calling a constituent assembly for the purpose. Of course, if there is a revolution, there would be another constituent assembly. But I am sure, we do not want a revolution merely because of the belief that constitutional changes in a defined field can be brought

Parliament which is of a character amending the Constitution, especially with regard to fundamental rights, I am rather impressed by the point made by Pt. Kunzru that, on the whole, one should be very careful before one brings in a two-thirds or three-fourths majority in the Supreme Court for dealing with such cases. It might to a large extent take away some of the dignity of the Supreme Court and result in a demand for an extension of the principle to any other matter which a particular sponsor thinks is equally important. However, there can be other methods to bring about changes in the Supreme Court in such cases. Jurists, however eminent they may be, are also human beings and have a social philosophy of their own, implicit or explicit, sometimes knowing it, sometimes unknowingly. When the Supreme Court determines the validity of the legislation, especially of a character affecting social and economic values, they cannot determine in the pure context of the law. A certain amount of philosophy is bound to enter their judgment and when it is so the Supreme Court judges are no more than any other citizen of the country. As lawyers they may have superior position but when they evaluate social and economic factors they are in no special position which puts them above anybody else. Therefore it is necessary that a special procedure should be laid down for the Supreme Court when dealing with the vires of the legislation that affects fundamental rights. In this connection I would suggest that where any case comes before the Supreme Court involving legislation which has affected, or which is alleged to have affected fundamental rights, then there should be a specially constituted session of the Supreme Court. I would even go to the length of suggesting, if that is possible, that we should have a Supreme Court which will only meet for the purpose of considering such legislation which is impinging on fundamental rights, because fundamental rights are extremely important. I entirely agree with the speaker who said before that it is a very good thing that we had this *Golaknath's* case, because it has brought before the people, in a very conspicuous way, the importance of the fundamental rights. Therefore, it is important and may I suggest that there should be a specially constituted Supreme Court which will only meet for consideration of constitutional amendments and other legislation which impinge on fundamental rights. There need not be another Supreme Court constituted for the purpose. The same Supreme Court should meet in a special session so that the whole spotlight is upon them and the whole country knows that it is not just one of the many cases they are dealing with, but with the Constitution itself and changes proposed for affecting fundamental rights.

**M.C. Setalvad:** But it is a matter of fact that the Supreme Court does deal with such cases by constituting a separate *Constitution Bench*. It is a procedure prescribed by the Constitution itself.

doing something different from its normal work of a Parliament. The normal work of Parliament is to enact laws, sanction the budget, seek information and so on. But when it passes legislation changing the Constitution then it is undertaking special work. I do not think what I am suggesting contravenes the Constitution nor is there anything to prevent that happening. It might be difficult to have another President, in which case the Speaker will continue to be the President. Nevertheless, it should be possible for Parliament by a resolution to say that for the next three days or so it will only discuss the amendment of the Constitution. This would ensure giving a certain measure of spectacularly and conspicuously visible notice to the people of the country that Parliament is meeting as a constituent assembly.

Then I would also suggest that much of the reasoning—I would not say legal reasoning—and the sentiment behind taking away from Parliament the right to change the Constitution affecting fundamental rights is, I am afraid, historically quite outdated. I would have acquiesced in this sort of judgment five or ten years ago when it was possible for one political party to make any change it wanted in the Constitution. It was possible then for all practical purposes to decide on constitutional changes not only by the requisite majority of Parliament but also by the Working Committee of the Congress Party, or the President of the Congress, or the Prime Minister and the Leader of the Congress Parliamentary Party. But today, the ruling party does not have anything like an outstanding majority in the Parliament. Also from what one can see of political trends in the coming years, it is most unlikely that any party is going to have that dominant majority in the central legislature which one party has had in the first 15 years of Indian political history. Therefore, I suggest that the apprehension that one party can bring about constitutional changes at its will is no longer valid. In fact it is very much outdated, and we should not, therefore, be afraid that Parliament would hastily amend the Constitution affecting fundamental rights.

Finally, I would affirm that Parliament has every right to amend the Constitution. There is no other authority under the Constitution contemplated by the Constituent Assembly which can amend the Constitution. Therefore, all talk of having any other agency for amending the Constitution is, in my opinion, invalid. Of course, any legislation passed by Parliament, constitutional or otherwise, is subject to review of the judiciary of the country. I do not think that can be taken away either. That is also part of the Constitution and no Parliament can change the position of the judiciary.

With regard to the suggestion to place restrictions on the present procedure of the Supreme Court for dealing with legislation passed by

not only the procedure for amendment but also the power of amendment. This can be done by inserting a suitable phrase in article 368. At the commencement of article 368, it may be stated: "This Constitution may be amended in accordance with the procedure hereinafter provided"—I am substantially in favour of Mr. Nath Pai's Bill.

**M. C. Setalvad:** You think this will not be hit by *Golaknath's* judgment?

**G. B. Agrawala:** That is what I think because there is no majority opinion of the Supreme Court on this point.

If you take away the reasoning of the five judges of the majority judgment, then there is no majority for their view that article 368 would not apply to the chapter on fundamental rights. The reasoning is based on the omission from article 368 of the provision that it also confers power of amendment.

**M. C. Setalvad:** Is this your point? What they held is that article 368, as it stands at present, does not permit the amendment to fundamental rights. But they have not said that you cannot amend article 368 so as to make it competent to deal with any amendment of fundamental rights.

**G. B. Agarwala:** What they have said is that article 368 does not contain, as it stands, the power of amending the Constitution. If the necessary language is supplied by an amendment the basis of the judgment would be gone. That is my submission.

**M. C. Setalvad:** The single point is that article 368 can be amended and made wide enough to amend the provision of Part III. Then it will take in even the law mentioned in article 13 (2).

**G. B. Agarwala:** If you directly amend article 368, to say that Part III is included in it, then it may be hit by the present judgment.

**M. C. Setalvad:** Can you say "any provision" of the Constitution?

**G. B. Agarwala:** So far "any provision" is concerned there may be a difficulty. We may retain the phrase "This Constitution" as it stands in article 368 at present. What I am saying is that article 368 may be amended to show that the power of amendment resides in the process of amendment itself. This would negative the reasoning of the majority judgment that article 368 does not contain the power, and that the power must be found in articles 245, 246 and 248, read with Entry 97 of List I. If the amendment makes it clear that power resides in article 368 itself, and is not to be found in articles 245, 246 and 248 etc., then the whole reasoning of the five judges at least will have no applicability.



**V. K. R. V. Rao:** For this purpose I would rather suggest that for passing judgment on such extremely important constitutional matters, the Supreme Court should be assisted by the Chief Justices of all the High Courts in the country. That I think would be a complete safeguard to see that any legislation passed by Parliament affecting fundamental rights is not undertaken lightly and is not approved lightly. That would be the biggest safeguard, I suggest, for our fundamental rights.

**C.B. Aggarwala:** The effect of judgment of the Supreme Court in *Golaknath's* case is that Part III of the Constitution is an exception to article 368, namely, that the fundamental rights in Part III cannot be amended in such a way as to abridge them. Any amendment of article 368 by which Part III is brought under the purview of article 368 would be contrary to the view expressed by the Supreme Court.

My own opinion is that the judgment of the majority is erroneous. But in this session we are assuming that the judgment is correct and trying to find out what steps we should take hereafter to overcome the mischief created by the judgment.

My suggestion, therefore, is that article 368 should be amended in such a way as to negative the reasoning of the majority of the judges. What is that reasoning? The reasoning of five judges—the judgment being delivered by the Chief Justice Subba Rao—is that article 368 merely contains the procedure for amendment and it does not contain the power of amendment and that the power of amendment has to be found in articles 245 and 246 read with 248 and item 97 of List I of Schedule VII. This reasoning is not, however, approved or referred to by Justice Hidayatullah, the sixth judge in the majority judgment. His decision is based on another ground. He says article 12 of the Constitution not only includes the Parliament or the Legislatures of States, but also the collective legislative or executive forces of the State, and that as such, when article 13(2) prohibits the State from making any law, it does not prohibit merely the legislative acts of Parliament or of the legislatures of the States, but also the process of amendment of the Constitution which is made by not only the Parliament but also the legislatures of all the States collectively. In this way the learned judge brings the amending provision of article 368 under the prohibition of article 13(2). My suggestion, therefore, is that if we clarify article 368 by making an amendment thereto, showing that it contains not merely the process for amendment but also the power of amendment, then the very basis of the judgment of the five judges, represented by the Chief Justice, would have gone away. That would neither be contrary to any provision of the Constitution nor amount to introducing any amendment in Part III. It would be merely clarifying the position in article 368 that it contains

judge of the Court had the opportunity to decide whether fundamental rights could be withdrawn or modified by amendment of the Constitution. If this procedure had been followed in the earlier cases, in *Shankari Prasad's* and *Sajjan Singh's* cases, may be, we would not have had the necessity of holding this Convention. In *Shankari Prasad's* case there were five justices, who decided the case even though the Court had the strength of eight justices at that time. With great respect to the judges who decided *Shankari Prasad's* case, I would say that three of the most eminent judges, Justices Fazl Ali, M. C. Mahajan and Vivian Bose, who could have contributed to a most important constitutional question were not included to sit on the Bench. If those three had sat in *Shankari Prasad's* case, it might not have been a unanimous judgment. It might have been a different judgment. Similarly when the *Sajjan Singh's* case was decided the Court consisted of eleven judges whereas the case was decided by five judges. Therefore, six judges had no opportunity of expressing their opinion in *Sajjan Singh's* case also. Those are the two decisions that have been overruled by the full Court of eleven judges when they sat in *Golaknath's* case. The fact that the decision is by a majority of one judge is not a significant consideration. You have decisions of the High Courts of other countries including the House of Lords taken by a majority of one. Notably in the Supreme Court of the United States many constitutional matters have been decided by a majority of 5 to 4. Therefore, what matters is that all constitutional questions should be heard by the entire Supreme Court and it makes no difference whether it has eleven judges or thirteen judges.

Various suggestions have been made to overcome the difficulties arising out of the *Golaknath's* case. I have referred in my paper to the practical difficulties in convening the constituent assembly. The suggestion of making a reference under article 143 also entails difficulties. Even if you get a different opinion in a reference, it may not overrule the considered judgment of the Court in the *Golaknath's* case. If article 368 is amended in order to give power which Parliament at present does not possess under article 368 I would entirely adopt the objection of Mr. S. K. Das that it would be doing indirectly what Parliament cannot do directly. If Parliament has not the power to abridge or take away fundamental rights by amending the Constitution how can it introduce legislation giving it that power which it does not already possess? In the circumstances, I would suggest that *Shankari Prasad's* case held the field for 15½ years. It has now been held to be wrongly decided by the Supreme Court. This judgment is barely six months old. All that it says is that you cannot abridge or take away fundamental rights even by amending the Constitution. But as far as Parliament is concerned no necessity has been made out as to what fundamental rights it should take away? Neither in the

**Nittoor Sreenivasa Rao:** There is really nothing for me to contribute except perhaps in a negative way. It seems to me that the basic view expressed by the majority is that the Constitution cannot be amended so as to take away or abridge the fundamental rights. It may not be possible to agree with this view and the decision may have brought about a difficult situation. Nevertheless, it has to be accepted as representing the correct position. It should, therefore, be seen whether to seek to achieve a different position by the exercise of ingenuity either by amendment of article 368 or by bringing into existence a constituent assembly as pointed out in Mr. Justice Hidayatullah's judgment or casually referred to in the other judgments, would not really be an attempt to circumvent the basic decision of the majority, which is the only part of the judgment that can be regarded as a decision on the point arising in the case. Therefore, what I would respectfully suggest is that all the suggestions that have been made, including the very interesting suggestion of Dr. V. K. R. V. Rao that certain powers of the Supreme Court should be withdrawn by making use of the emergency powers, should be very carefully examined to see that no expedient is resorted to which in the ultimate analysis is not straightforward; since intellectual integrity is also of the utmost importance, and should not be sacrificed even though, as I have said, one may not agree with the majority decision, and it might appear that it has led to a difficult situation. That is all that I have got to submit.

**K. L. Gauba:** Keeping in view the trend of debate on the question of *Golaknath's* judgment in this Convention, I find that I am in the minority. I belong to that section of opinion that holds the view that *Golaknath's* case has been correctly decided.

It is said by Dr. Rao that what we need now, perhaps, is a new Supreme Court to deal with constitutional questions. I more or less agree with Dr. Rao in this matter. It can be done under the present procedure without amending the Constitution. All constitutional questions are to be heard by a Bench of at least five judges and the Constitution has not fixed the maximum number of judges for the purpose. Usually constitutional questions in the Supreme Court are brought before five judges. Sometimes seven judges, twice nine judges, and only once eleven judges constituted the Bench. On the contrary in the United States all constitutional questions are decided by the entire Supreme Court consisting of nine justices. There it cannot be said that a particular Bench was constituted with a view to arriving at a particular decision. For the first time in this constitutional question of the greatest importance, Chief Justice Subba Rao constituted the Bench consisting of the entire Court of eleven judges without considering what would be the result. Every

Supreme Court had carried out its intention of declaring the 'New Deal legislation' invalid. It would mean as if the judges were being appointed, not because three more judges were needed to cope with the heavy work of the Supreme Court, but in order to secure the acceptance of Parliament's views by the Supreme Court. This would not enhance the prestige of either the Supreme Court or that of the Government of India.

In case the Supreme Court is still of the view that fundamental rights cannot be amended by Parliament, the only course then open to a government under the parliamentary system would be to adopt the same course as was done by the Liberal Government in England in 1911, when it had decided to curtail powers of the House of Lords. I hold that the present Parliament of India, which was elected only in March 1967 is fully competent to amend the Constitution, including Part III—Fundamental Rights. But, in case the mandate of the Parliament is challenged, the only remedy is to obtain a fresh mandate from the people, i.e., the electorate. The Indian Constitution makes no provision for referendum as it exists in the Australian Constitution. I, therefore, repeat that the only course then open would be to obtain from the electorate a fresh mandate specifically for amending fundamental rights, if the right of Parliament to do so is again challenged by the Supreme Court.

(Shrimati) S. K. Kapoor: I must make it very clear at the outset that I have no remedies to offer. As a lay person, I have only a few simple observations to make on the subject.

Being aware of the changing conditions in my own country and in the world at large, I would like to start by mentioning one very important, rather, I should say fundamental point in relation to society today. No society today is static. It must be dynamic moving towards change and progress all the time. Rigidity is the root of all evil and leads to degeneration. Hence it follows that rules, regulations and principles which govern human society or which are directly or indirectly concerned with human beings must never be rigid. There must always be room for improvement, for amendments, for additions, if necessary, to suit the changing pattern of the society and the needs and aspirations of the people of the country at a particular time. This holds very true of a constitution and particularly that part of a constitution which deals with the fundamental rights of the people. Although these are basic fundamental rights, the time may come, and the time is always changing and changing very fast, when the concept of fundamental rights may assume larger connotations or even *vice versa*. The Fathers of our Constitution were very eminent men, men who had made tremendous sacrifices for the independence of the country and the people who had lived and suffered with the common man and had gone through all the humiliations. They knew the true picture of the

300 pages that have been circulated to the most learned people in this Convention nor in the speeches that have been made for the last three days has a case been made out that particular fundamental right needs be altered for the benefit of the society as it exists today and by reason of *Golaknath's* judgment Parliament is precluded to bring out such amendments. As I can see at present there is no need to take away any of the fundamental rights. The *Golaknath's* judgment is not a hurdle as is understood by many. My view is that it should be allowed to stand.

**B. V. Baliga:** I am not intervening to participate in the entire scope of the debate. I agree to a very large extent substantially with what Mr. Sarkar has said. I may contribute only one idea, with regard to the difficulty enunciated by him about holding the referendum. True it is, but can we not find a *via media*? The idea that I have in mind is, can we, or can we not deal with the idea that whenever any constitutional amendment is to be brought, it should be done as a condition precedent that it be circulated for public opinion for a minimum period of three to six months and then alone it is deliberated and proceeded further. Because the public by that time on their own initiative, or by going through the draft reported to them or with the aid of such facilities that are available at the time or with such steps that might be thought proper, would assert its opinion and exert necessary influence. After all referendum to persons who will not perhaps be able to appreciate the fine distinctions of constitutional principles may go on a different footing, and if we want really deliberative and correct opinion and guidance to be got, it can be got by proceeding this way.

**Gurmukh Nihal Singh:** Today I am intervening in the discussion only to place before you my suggestions to overcome the difficulties created by the recent Supreme Court judgment. Is it possible to do so? If so, how? I make the following suggestions in this connection.

First, the next session of the Parliament may be summoned specifically to consider Mr. Nath Pai's Bill, in the form in which it emerges from the Joint Committee to which it was referred to in the last session, along with, of course, other matters and measures. This will serve the same purpose which Dr. V. K. R. V. Rao has in view. In case the Bill is passed by the Parliament, in accordance with the procedure laid down in article 368 it may be made a test case. This will provide an opportunity to the Supreme Court to review its previous ruling, if it so desires.

I am personally not in favour of the suggestion made by Dr. P. N. Sapru, which appears to have support of Pt. H.N. Kunzru, that the Government may appoint three more judges to the Supreme Court. It would be doing what President Roosevelt had threatened to do, if the U.S.

majority of the votes cast. The Secretariat of the Congress shall be that of the National Assembly.

No amendment procedure may be undertaken or followed if it is prejudicial to the integrity of the territory.

The Republican form of Government shall not be the object of an amendment.

This is an example to show that it is possible, as has been done in many other countries to invest constituent powers to a constituted body like Parliament. According to me, and according to many other friends with whom I held discussions, that was what was done by article 368.

It has been said by the majority of the Supreme Court that a law passed under the procedure laid down in article 368 is not constitutional law but only ordinary law. In fact they do not make any distinction between the two legislations. Now, there is a Bill pending before Parliament. If Nath Pai's Bill is passed—I say that because I am supporting that Bill; Government have decided to support that Bill—even then it will be a 'law' and, therefore, hit by article 13(2). I have no doubt about it. The reason for the Government to support the Bill was that in the ultimate analysis we can get over the impasse created by the *Golaknath* case only if we can persuade the Supreme Court in a subsequent case to hold that what has been laid down in the *Golaknath* case is not a correct rule. In order to persuade them, probably it may be useful to show by amendment that article 368 contains specifically, not only the procedure for amendment, but also the power of amendment. This is the object sought by Nath Pai's amendment Bill. I moved an amendment to Nath Pai's Bill that it be referred to a Joint Committee because it will have to be improved upon in many respects. My object would be, or Government's object would be, to see that article 368 is so amended as to make it clear that it contains the power to amend the Constitution as well as the procedure to amend. As I said, the Supreme Court may pronounce against it too, according to what has been laid down by the majority in *Golaknath's* case. There will be difficulties even after that. I believe this is the only way open for us. We have again to approach the Supreme Court, but *before doing that article 368 will have to be properly amended, as it is* capable of being amended even according to the decision of the Court. It is very difficult for me to agree to the proposition that the power to pass a law to amend the Constitution has been relegated to residuary power under Entry 97 in the Union List, after having provided a long article like article 368 in the Constitution. It is no use referring to the debate which took place in the Constituent Assembly because whatever may have been the tenor of the debate, it is open to the Supreme Court to determine the import of a particular article. So having declared by

amending process. Parliament must amend article 368 to convoke another Constituent Assembly, pass a law under item 97 of the First List of Schedule VII to call a Constituent Assembly. And then that Assembly may be able to abridge or take away the fundamental rights, if decided. It cannot be done otherwise.

This is definite enough. Now, the Japanese Constitution provides for a referendum. I do not think that the process of referendum will be suitable to conditions in India. Secondly, I do not think that there is a provision in our Constitution for a referendum. The Goanese example is not apt. If in the referendum which was conducted in Goa the verdict was otherwise, then action would have been necessary under articles 3 and 4. What happened in Goa was only an informal method of consulting opinion. There is no such method provided in our Constitution; and if a law is passed to conduct a referendum, I fear that law will still be hit by article 13(2). You will be indirectly doing something which you cannot directly do.

Then, a constituent assembly may be called. That was another suggestion. That, too, is bristling with the same difficulty. You would have to enact a law. Justice Hidayatullah speaks of amending article 368 and of passing a law under the residuary powers to convoke a constituent assembly. But these laws also will be hit by article 13(2), if the present view of the Supreme Court prevails. I do not know whether the learned judge thought about it.

He refers to the French Constitution. Now, in most of the countries of the world, Parliaments have been invested with constituent powers. Every constituted body may be invested with constituent powers and according to me, that was what was done by the Indian Constituent Assembly also. I have got the articles of the French Constitution bearing on this matter, i.e. article 89, which reads:

"The initiative for amending the Constitution shall belong both to the President of the Republic on the proposal of the Premier and to the Members of Parliament.

The Government or Parliamentary Bill for amendment must be passed by the two Assemblies in identical terms. The amendment shall become definitive after approval by a referendum."

It does not stop there but goes further to say:

"Nevertheless, the proposed amendment shall not be submitted to a referendum when the President of the Republic decides to submit it to Parliament convened in Congress; in this case the proposed amendment shall be approved only if it is accepted by a three-fifths

Similarly we should so amend article 368 to provide that Parliament, if necessary both the Houses, shall be convened in a constituent assembly and it shall meet especially to deal with an amendment of the Constitution. So, retaining the power of amendment, and possessing constituent powers, you can bestow special attention to see that the Constitution is not lightly dealt with.

Now, this apprehension has been referred to by Justice Hidayatullah himself in his judgment and that represents the general feeling on this matter. He says:

I am apprehensive that the erosion of the right to property may be practised against other fundamental rights.

It is a fact that it has not yet been practised. He is apprehensive that it may be practised against other fundamental rights. If a halt is to be called, he said, the Court must declare against the right of Parliament to abridge or take away fundamental rights, because

"small inroads lead to larger inroads and become as habitual as before our freedom was won."

So it is that apprehension which has created the situation in which it was thought a halt should be declared. Although this is not exactly a judicial way to approach the matter, that is what has been done.

It is not correct to distrust Parliament because articles 14, 15, 16 and 19 and other fundamental rights which have been given to the people by the Constitution, have not been attempted to be reached, and if you think that a day will come when Parliament might abrogate all these sacred fundamental rights then any amount of judicial interpretation or prevention of amendment of the Constitution will not stop the abrogation. It can be stopped in other ways. So you have to trust Parliament to do the right thing. After all, in England the right of habeas corpus, the Bill of Rights, etc. could be theoretically amended by an ordinary legislative process in Parliament, but we never hear of that; and in India also, except article 31 (which according to one of the six judges should not have been there) nothing has been attempted to be amended. Therefore, I think we should make an attempt to so amend the Constitution in article 368 and elsewhere, if necessary; and again approach the Supreme Court and show that the reasons which persuaded them to hold otherwise in the earlier case have been removed, and, therefore, the original position should be restored. That is the only way.

**P. K. Tripathi:** I will confine myself to the various alternative methods that we have to consider to overcome the difficulty created by the *Golak Nath* case. As to the suggestion for holding a referendum many



Parliament that article 368 contains the power to amend the Constitution, and having provided for Parliament to exercise constituent powers in a proper manner, I think on an appropriate occasion later, it should be possible for a citizen or for the Government to approach the Supreme Court for a review of what they have laid down already in the *Golaknath* case. Normally that is the only way which I could think of, because of the rule laid down in the *Golaknath* case by the majority.

Now, I would like to see that article 368 is amended in the manner in which it has been laid down in the French Constitution as to which Dr. V. K. R. V. Rao, has also referred. I think difficulties have been created by the wrong impression that Parliament has acted hastily and too often in the matter of amendment of the Constitution. This has created the feeling that the Constitution has become a plaything of a majority, to borrow the expression used by Justice Hidayatullah. The impression that the Constitution has been amended many times by the Indian Parliament with a view to abridge fundamental rights is wrong. The appendix to the Working Paper will show that although there have been 21 amendments of the Constitution, only three of them touch fundamental rights. We have got a Constitution with 395 articles and 9 Schedules and it becomes often necessary to amend the Constitution. The latest and twenty-first amendment is the one to introduce the word 'Sindhi' in the 8th Schedule of the Constitution and that also counts for an amendment of the Constitution. An earlier amendment was to rectify some trouble with respect to the appointment of judges in the U. P. and that also counts as one of the twenty-one amendments of the Constitution. Another was for States reorganisation. Parliament really tried to reach fundamental rights only on three occasions and Justice Hidayatullah has referred to these instances in his judgment. I agree that the seventeenth amendment has created some uneasiness. This amendment introduced all sorts of bills, laws and Acts into the Ninth Schedule. It is felt by some that most of them did not deserve to go there. I endorse what Dr. Rao said that when Parliament is sitting as a constituent assembly, we must so amend article 368 to provide that it is sitting on a special occasion with an identity distinct from that of Parliament. That counts a lot. Today, after a no-confidence or after adjournment motion, or after interpolations, when someone gets up and tries to amend the Constitution, you do not have the feeling that you are sitting as a constituent assembly. The words used in the French Constitution are, as already pointed out,

"Nevertheless the proposed amendments shall not be submitted to a referendum when the President of the Republic decides to submit it to Parliament convened in Congress."

**M. C. Setalvad:** Professor Tripathi, what is suggested really is—Chatterji suggested it, if I may use that expression, without any offence—to have built in, enlarged and well-worded article 363, and then again approach the Supreme Court. What do you think of that?

**P. K. Tripathi:** My point is that this strategy is full of fallacies. This is nothing but going to the Court and telling them, please reconsider. This will not make anybody yield. There is an approach which is possible. This I would consider a little later.

Now, coming to the question of forming a constituent assembly : it is very necessary to understand first of all, what is the nature and scope of its powers? I have never heard of a constituent assembly being called by anybody. If any person or body can have the authority of calling the constituent assembly, he or it may as well give us the Constitution.

I do not subscribe to the view that the 1946 Constituent Assembly has been able to give us this Constitution, because the British Parliament authorised it to do so. It would not have been in a position to give us the Constitution even if the British Parliament had not authorised it. My submission is that if the British Parliament today repeals the Government of India Act 1947, you are not going to lose the sovereignty that you have obtained.

**M. C. Setalvad:** Then what do you suggest?

**P. K. Tripathi:** My suggestion, therefore, is this: Because any alternative, any suggestion, which takes you back to the Court and which makes you act under the present Constitution, will be a suggestion which will be open to the same difficulties to which the seventeenth amendment was. You have no alternatives under the existing Constitution. Therefore, the only alternative which I am not suggesting is that at some time, when necessary, when everything else fails, including the alternative I am submitting, then you have to convene a powerful body which will give you either a new Constitution or make such changes as are necessary in Part III or Part XX of the Constitution. Of course, that is a very drastic step and we hope that everyone concerned with the running of the Constitution will try to evade that drastic event. Therefore, the concrete suggestion that I make has merit of giving Parliament and the Court time to think over this decision. Instead of attempting to make an amendment in article 368, the Parliament should by a big majority pass resolutions disapproving of the *Golak Nath* decision and declaring that Parliament has the power to amend every provision of the Constitution. If you pass any amendment you are first of all assuming, and subscribing to the views of the Court that you did not

difficulties, like a large population, a large electorate and so forth, have been pointed out. In addition to these there is one more difficulty. Even if the Constitution is amended by a referendum, it will not be valid, because if you look into the judgments, the keynote is a distrust for mere majorities and referendum so carried would be by a majority vote. You are not going to get an amendment even through referendum by unanimous vote. Therefore, the more basic question is, what is the sanctity of a majority or two-third majority? Both in the *Sajjan Singh* case and in the *Golak Nath* case the majority opinions have stressed on the reasons for discouraging decisions to be taken by mere majority or mere two-third majority. We have to diffuse our minds about this. Either we are a democratic country or we are not. If we are a democratic country then a two-third majority is not a mere two-third majority. Therefore, holding a referendum and then again going to the same court which has a disregard for a two-third majority will probably not help.

The other suggestion is with regard to Mr. Nath Pai's Bill that is pending in Parliament for amending article 368, so as to put in it power to amend the Constitution. The majority party in Parliament, as we have just heard from the Hon'ble Minister, is inclined to support this Bill. This is again deceiving ourselves, because if we are going to the Supreme Court once again with this amendment, we are going to ask them to review their decision. This is far from the realities that are involved. You are going to the same Court, asking it to change its already declared policy. The Court is bound to turn it down if it continues to be of the same mind. No useful purpose would, therefore, be served by amending article 368 in such a way. Even if the article is amended to clarify that it contains power to amend the fundamental rights, either expressly or impliedly, the Court is not going to read article 13 subject to it unless article 13(2), which defines the word 'law' is itself suitably amended.

**M. C. Setalvad:** Mr. Nath Pai's amendment is, as put by Mr. Menon to make it perfectly clear that Parliament when acting under article 368 is exercising a constituent power.

**P. K. Tripathi:** My submission is that in that case you would be for the first time giving to Parliament a power to amend fundamental rights in article 368. That will be subject to the same infirmity as the seventeenth amendment.

**M. C. Setalvad:** How will it be if the Court takes a different view?

**P. K. Tripathi:** If the judges are going to change that is a different question.

it has put on the word 'law' as in article 13 and the interpretation it has given to article 368. Nevertheless, it should go in the resolution that Parliament does not think it necessary that any constitutional amendment is necessary for this purpose on account of this event and it hopes that the Supreme Court will review its decision.

**M. G. Setalvad:** Would it be constitutional and proper for Parliament to pass a resolution saying that it does not agree with the decision of the Supreme Court, the highest Court, the decisions of which are made obligatory to be followed by all the courts? I think it may not be proper for Parliament to follow such a course of action.

**P. K. Tripathi:** First of all, if we want to test the propriety of these things, let us apply that test to everything. It will not be proper for Parliament to try to amend article 368 when it knows it does not have the power. So trying to amend article 368 and then Mr. Nath Pai's suggestion, or anybody's suggestion, will be likewise improper constitutionally. It would simply mean that knowing that you do not have the power you are passing the amendment.

**M. G. Setalvad:** One of the judges has said that you can amend article 368.

**P. K. Tripathi:** Nobody has indicated to me the manner in which article 368 can be amended without offending article 13 to achieve the purpose that you have in mind. My submission is that the judgment, as it is before us, does not indicate that the Court has been firmly of the opinion that article 368 is not amendable. There is a majority of only one, and we should not lose sight of the fact that in this case the majority had agreed that it will not upset the validity of the seventeenth amendment. It is my case that if some of the judges in the majority had insisted that they will topple down the seventeenth amendment also, they would, perhaps, have not got a majority. So let us give due consideration to the possible motivation of the judges who had joined the majority opinion. The decision by itself is innocent. If you look at it, *Golak Nath's* is a unanimous decision of the Supreme Court that the seventeenth amendment is valid.

**M. G. Setalvad:** You think that the method of adopting the resolution would be better and give time to the Court to think things over and things may improve, cool down and probably the Court itself, in some cases, which go before it, may take a different view.

**P. K. Tripathi:** My submission is that *Golak Nath's* case should not be understood to be an authority that the Parliament does not have the power to amend by two-third majority fundamental rights. It is no

have the powers under article 368 and that in article 13(2) 'law' does not include 'constitutional law'. Instead, if a resolution is passed in the Parliament, by as big majority as you are capable of summoning for this purpose, then you will be just telling the Court that this is the view which the country, speaking through Parliament, does not subscribe to. No further drastic notice is necessary.

There was a time when in England the courts held that they had the power to review legislation by Parliament on the ground of reasonability. I am referring to *Dr. Bonham's* case. But the Parliament did not pass any law to say that the courts do not have the power. The Parliament just waited and waited in strength, waited for the court to think it over. It will be very unfair to the Supreme Court of India that just because by a majority of one they have given a particular decision, about the reasoning of which the judges themselves are sharply divided, we should change the Constitution of which there is no need and try to make a mess of things. I am sure that if you look at the judgments you will find that in the next case that goes before the Court, there is going to be no majority. That is at least one possibility. I see that possibility very preponderantly, because if you go again to the Court in the next case, after a year or two when things have cooled down, it would very probably not stick to the *Golak Nath* majority decision.

The main basis in the decision by Justice Hidayatullah, for instance, is perhaps the failure on our part to tell him what is the distinction between the constitutional and ordinary law.

**A Member:** May I point out one thing. Under article 121, Parliament cannot discuss the judgment of the Court.

**L. M. Singhvi:** It is a question of Parliament and an Act of Parliament. There is no basic difference. There can be a declaratory amendment. There can be a declaratory resolution. They can also be struck down,

**P. K. Tripathi:** There is a difference. An Act requires the assent of the President. The resolutions do not require the assent of the President. My suggestion, perhaps, is not very clearly understood. It is not that we pass a law. It is that we pass something less than a law, because a law will be a very drastic thing. Therefore, my suggestion is that Parliament should only pass a resolution.

Apart from the nicety of the drafting, broadly the resolution should say that the Parliament here assembled does not agree with the restrictions which the Supreme Court has sought to put upon its power to amend the Constitution and that it does not agree with the construction

it has put on the word 'law' as in article 13 and the interpretation it has given to article 368. Nevertheless, it should go in the resolution that Parliament does not think it necessary that any constitutional amendment is necessary for this purpose on account of this event and it hopes that the Supreme Court will review its decision.

**M. G. Setalvad:** Would it be constitutional and proper for Parliament to pass a resolution saying that it does not agree with the decision of the Supreme Court, the highest Court, the decisions of which are made obligatory to be followed by all the courts? I think it may not be proper for Parliament to follow such a course of action.

**P. K. Tripathi:** First of all, if we want to test the propriety of these things, let us apply that test to everything. It will not be proper for Parliament to try to amend article 368 when it knows it does not have the power. So trying to amend article 368 and then Mr. Nath Pai's suggestion, or anybody's suggestion, will be likewise improper constitutionally. It would simply mean that knowing that you do not have the power you are passing the amendment.

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**M. G. Setalvad:** You think that the method of adopting the resolution would be better and give time to the Court to think things over and things may improve, cool down and probably the Court itself, in some cases, which go before it, may take a different view.

**P. K. Tripathi:** My submission is that *Golak Nath's* case should not be understood to be an authority that the Parliament does not have the power to amend by two-third majority fundamental rights. It is no

authority for it. The majority who have joined in that decision have joined because they knew that this is not going to bring any calamity on the country, or topple down any of the amendments to the Constitution. My understanding of the judgments is that they have only tried to underline the significance of fundamental rights without depriving Parliament of the amending power. If that is so, for Parliament to rush for amendments, will be one of those mistakes we made in the 1950s regarding which Justice Mahajan afterwards said: "Why did you amend the fundamental rights relating to the freedom of speech by adding more categories of exceptions in article 19(2). You should have waited for us to decide the case." We were panicky when there was a decision in Bihar given by Justice Shanti Prasad and others that incitement to commit murder and violence is also protected under freedom of speech. That was a wrong decision, I submit. But the Supreme Court did say later on why was it necessary to amend it, they would have changed the law in due course. We are probably repeating that mistake and the next Supreme Court will again call us for having messed up things, just because we have no faith in the Court and we did not wait. So my submission is that the resolution is the only way of expressing your views.

**R. S. Gae:** I take this opportunity first to thank Dr. Singhvi for convening this Convention under the auspices of the Institute of Constitutional and Parliamentary Studies and other associations connected with it. This affords a very good opportunity to parliamentarians, lawyers, economists and other persons to examine the interesting and complicated issue posed by the Supreme Court in *Golak Nath's* case.

I shall touch upon only a few aspects of the majority judgment of the Supreme Court in *Golak Nath's* case and make comments in respect of the same in so far as they have not been duly commented upon or highlighted by the previous speakers upto now.

The Supreme Court had the occasion to consider in *Golak Nath's* case the validity of the first, fourth and seventeenth amendments of the Constitution relating to fundamental rights to property. The circumstances leading to these amendments may be briefly summarised.

Soon after the commencement of the Constitution several State Legislatures enacted laws regarding agrarian reforms in land so as to carry out Directive Principles of State Policy contained in article 39 of the Constitution. These laws were successfully challenged in several High Courts on the ground that they infringed fundamental rights guaranteed by Part III of the Constitution. In view thereof the State Governments approached the Central Government to amend the Constitution with a view to giving effect to the objective of agrarian land reforms, having regard to the provisions of Part IV of the Constitution.

This resulted in the enactment of the Constitution (First Amendment) Act, 1951. This Act inserted two new articles, namely, article 31A and article 31B. Article 31A deals with the saving of laws providing for acquisition of estates, etc. and article 31B provides for the validation of certain Acts and Regulations. The latter article validated 13 Acts and Regulations specified in the Ninth Schedule to the Constitution with the result that these Acts and Regulations cannot be challenged as violating articles 14 and 31 of the Constitution. The validity of the first amendment of the Constitution was upheld by the Supreme Court in *Shankari Prasad's* case wherein it was held that the amendment of the Constitution was not a 'law' and hence did not require compliance with article 13(2) of the Constitution.

The fourth amendment was necessitated in view of the Supreme Court decision in *Bela Banerji's* case wherein it was held that compensation payable for property compulsorily acquired under article 31(2) is the just equivalent of what the owner has been deprived of at or about the time of acquisition of the property and that the issue regarding compensation is justiciable in a Court of law. Several States complained to the Central Government that the payment of compensation for the property acquired on the above basis would come in the way of their carrying out Directive Principles of State Policy contained in Part IV of the Constitution. This resulted in the enactment of the Constitution (Fourth Amendment) Act, 1955. Article 31(2) was amended providing that the adequacy of compensation payable for property compulsorily acquired by the State would not be justiciable in a court of law. The Act further amended article 31A and inserted several more Acts in the Ninth Schedule to the Constitution.

Some of the High Courts gave restricted meaning to the definition of 'Estate' contained in article 31A in relation to its application to *ryotwari* tenures in the States of Kerala and Madras. This necessitated the enactment of the Constitution (Seventeenth Amendment) Act, 1964, whereby the definition of 'estate' as contained in article 31A(2) of the Constitution was amended and forty-four more Acts were inserted in the Ninth Schedule to the Constitution. Thus the Ninth Schedule now contains sixty-four Acts and Regulations which cannot be challenged as violating the fundamental rights contained in Part III of the Constitution.

The validity of the seventeenth amendment was upheld by the Supreme Court in *Sajjan Singh's* case wherein it was held that the power to amend the Constitution available under article 368 was wide enough to include the power to take away or abridge the fundamental rights guaranteed by Part III of the Constitution.



It will be seen from the first, fourth and seventeenth amendments broadly referred to above that these amendments imposing restrictions on the fundamental right to property were made by Parliament with a view to giving effect to the Directive Principles of State Policy contained in Part IV in so far as they came in conflict with the provisions regarding fundamental rights contained in Part III of the Constitution.

The validity of the first, fourth and seventeenth amendment Acts was challenged in the Supreme Court in *Golak Nath's* case. This case was heard by the full Court consisting of eleven judges. Six judges constituting majority held that the above Acts were void as from February 27, 1967, whereas the remaining five judges constituting minority took the contrary view.

Principles emerging from the majority judgment of the Supreme Court may be briefly summarized as under:

- (a) Article 368 only provides for the procedure to be followed for amendment of the Constitution.
- (b) Article 368 does not contain the actual power to amend the Constitution.
- (c) The power to amend the Constitution is contained in the residuary legislative power of Parliament contained in article 248 and Entry 97 of the Union List.
- (d) 'Law' as defined in article 13(3) includes not only the law made by Parliament in exercise of its ordinary legislative power but also an amendment to the Constitution made in exercise of its constituent power.
- (e) An amendment to the Constitution, being a 'law' must conform to the provisions of article 13(2) and cannot, therefore, take away or abridge the fundamental rights guaranteed by Part III of the Constitution.
- (f) Parliament will have no power from the date of the Supreme Court judgment to amend the provisions of Part III so as to take away or abridge the fundamental rights enshrined therein.
- (g) The first, fourth and seventeenth amendment Acts abridge the scope of fundamental rights and are therefore *ultra vires* the Constitution.
- (h) Though the above Acts were invalid, the decision of the Court would have only prospective operation as from the date of the

judgments and the said Acts would thus continue to be valid till then. For the purpose Chief Justice Subba Rao and other four judges concurring with him relied on the doctrine of "prospective overruling", whereas Hidayatullah, J., in a separate judgment concurring with the Chief Justice, relied on the doctrine of "acquiescence" in the matter.

It follows from the majority judgment broadly referred to above that the three amendment Acts and any action taken in pursuance thereof are valid and continue to be valid. Similarly, 64 Acts and Regulations included in the Ninth Schedule to the Constitution also remain valid and cannot be challenged as violating the fundamental rights guaranteed by Part III. Any law hereafter enacted by Parliament or a State Legislature in pursuance of the first, fourth and seventeenth amendment Acts would be also valid and cannot be challenged on similar grounds. However, Parliament would not be competent as from February 27, 1967 to amend the Constitution and to enact a law in pursuance thereof, if such amendment abridges or takes away any of the fundamental rights guaranteed by Part III of the Constitution.

On a careful scrutiny of the majority decision of the Supreme Court it is felt that the Supreme Court did not give due thought and consideration to the fact that Directive Principles of State Policy contained in Part IV had to be given effect to having regard to the fundamental rights contained in Part III of the Constitution. As observed above the first, fourth and seventeenth amendment Acts were made only with a view to avoiding conflict between the provisions of Part IV and Part III, so as to give effect to the socio-economic development of the country as contemplated in Part IV.

In view of the majority decision it would not henceforth be open to Parliament to give effect to the Directive Principles of State Policy contained in Part IV when such principles come into conflict with the fundamental rights guaranteed by Part III as interpreted by the Supreme Court. Steps would thus require to be taken to remove the impediment on the right of the Legislature resulting from the majority decision as aforesaid. This is all the more necessary in view of article 37 which imposes a duty on the State to apply Directive Principles of State Policy in making laws and provides that though these principles are not enforceable by any court, they are nevertheless fundamental in the governance of the country.

If the power to amend the fundamental rights is to be restored to Parliament, as it ought to be, different courses need consideration to give

It will be seen from the first, fourth and seventeenth amendments broadly referred to above that these amendments imposing restrictions on the fundamental right to property were made by Parliament with a view to giving effect to the Directive Principles of State Policy contained in Part IV in so far as they came in conflict with the provisions regarding fundamental rights contained in Part III of the Constitution.

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- (d) 'Law' as defined in article 13(3) includes not only the law made by Parliament in exercise of its ordinary legislative power but also an amendment to the Constitution made in exercise of its constituent power.
- (e) An amendment to the Constitution, being a 'law' must conform to the provisions of article 13(2) and cannot, therefore, take away or abridge the fundamental rights guaranteed by Part III of the Constitution.
- (f) Parliament will have no power from the date of the Supreme Court judgment to amend the provisions of Part III so as to take away or abridge the fundamental rights enshrined therein.
- (g) The first, fourth and seventeenth amendment Acts abridge the scope of fundamental rights and are therefore *ultra vires* the Constitution.
- (h) Though the above Acts were invalid, the decision of the Court would have only prospective operation as from the date of the

to be left to be settled by convention. When the Constitution makers have included as many as 395 articles in the Constitution and appended nine Schedules thereto, it is inconceivable to imagine that they did not include any specific provision in the Constitution giving power to Parliament to amend the Constitution. As a matter of fact, article 368 itself gives such a power. However, the majority decision of the Supreme Court has taken the view that this article merely contains procedure for amendment of the Constitution.

If Parliament enacts a law under article 248 as contemplated above, it would be open to Parliament functioning as constituent assembly to amend the Constitution including the fundamental rights guaranteed by Part III by a simple majority of its members. It is inconceivable that the framers of the Constitution contemplated any such position when they expressly provided under article 368 for an amendment of the Constitution by a majority of the total membership of each House of Parliament as well as by a majority of not less than two-thirds of the members of the House present and voting. Any law so made by Parliament would have virtually the effect of overriding the provisions of article 368.

It is further considered that it was not contemplated by the framers of the Constitution to set up another constituent assembly to meet the situation of the type under consideration, nor can such a constituent assembly be based on any wider franchise than that now prescribed by Parliament. When Parliament cannot amend the Constitution taking away or abridging the fundamental rights as held by the majority decision, how can a constituent assembly, being a creature of statute enacted by Parliament, arrogate to itself the power which Parliament itself does not possess? Parliament functioning under the Constitution is a constituted body and not a constituent body. It would be really anomalous to conceive that such a constituted body, which is not itself competent to amend Part III of the Constitution, can by ordinary law create a constituent body having power to amend the said Part.

Difficulty in the matter has been further augmented in view of the subsequent judgment of the Supreme Court given in April last (1967) in the *Rajasthan Electricity Board's* case, wherein it was held that the definition of 'the State' contained in article 12 was wide enough to include within it every authority, whether constitutional or statutory, created by a statute and functioning within the territory of India or under the control of the Government of India. Any constituent assembly formed for the purpose of amending the Constitution by a law enacted by Parliament would thus come within the definition of 'the State' contained in the said article. In view thereof the constituent assembly formed as aforesaid would be

effect to such power. In this connection five courses arise for consideration and I shall now briefly deal with the same.

The first course is to request the Supreme Court to reconsider its decision in *Golak Nath's* case by raising a similar issue before it in an appropriate case. However, I do not see any compelling reasons or circumstances whereby the Supreme Court can be persuaded to adopt this course. This is all the more so when the decision has been given very recently and that too by the full Court consisting of eleven judges, six of whom gave the majority decision and the remaining five the minority decision. Until the rigour of majority decision is reduced or softened down by adopting appropriate remedial measures, which I shall shortly deal with, it would not be prudent to rush to the Supreme Court with an application to reconsider its decision. In view thereof I would not recommend the adoption of this course.

The second course is to invoke the Supreme Court's advisory jurisdiction by making a Presidential reference under article 143(1) of the Constitution. Jurisdiction of the Supreme Court under this article is merely advisory and the opinion given by it has not the same binding force or effect as the decision of the Supreme Court. The opinion so given would not prevent the Supreme Court from taking a contrary decision thereafter, if the validating measure is challenged in an appropriate case. Further, the Supreme Court is not bound to give its opinion on a question referred to it under the said article. It may even decline to give its opinion in the matter. In view thereof this course is also not feasible in the matter.

The third course is to ask Parliament to enact a law under article 248 and Entry 97 of the Union List for summoning another constituent assembly and thereafter to amend the Constitution as envisaged in the majority decision of the Supreme Court. In this connection it may be observed that the five of the majority judges have not expressed any final view in the matter and hence the observations made by them in this behalf are merely in the nature of *obiter dicta*. Only one judge, namely, Hidayatullah, Justice, has expressed some categorical views in the matter.

According to Justice Hidayatullah, if Parliament wishes to modify any of the fundamental rights guaranteed by Part III, it can do so not by invoking the provisions of article 368, but by enacting a law under its residuary legislative power for convening a new constituent assembly for the purpose. Such a law can be enacted by a simple majority of Parliament.

Several foreign jurists have criticised that the Indian Constitution is in certain respects too long and provides for certain matters which ought

- (iii) Provision regarding the assent of the President on a Bill for the amendment of the Constitution contained in the article may be omitted.
- (iv) The article may be further amended providing that an amendment of the Constitution under the article shall not be deemed to be a law within the meaning of article 13(3) of the Constitution.
- (v) The operative part in the proviso to the article may be duly amended so as to bring out a proper rationale in respect of the provisions contained therein.
- (vi) The marginal note to the article "Procedure for amendment of the Constitution" may be duly amended.

Other consequential and incidental amendments may also be made so as to give effect to the proposal referred to above.

Amendments broadly on the lines referred to above are suggested with a view to meeting some of the points on which reliance was placed in the majority decision of the Supreme Court. The purpose of the amendment is to show that an amendment of the Constitution made by Parliament in exercise of its constituent power stands on a different footing from an amending law made by Parliament in exercise of its legislative power available under article 246 of the Constitution. In this connection the provisions of article 46 of the Constitution of the Eire and article 5 of the Constitution of the U. S. A. may be noted by way of analogy in the matter. The provision that an amendment of the Constitution shall not be deemed to be 'law' within the meaning of article 13 has been suggested in view of the observations made by the majority of the Supreme Court that if it was intended by the framers of the Constitution to exclude amendment of the Constitution from the purview of article 13(2) they would have made an express provision to that effect in the Constitution. In this connection it may be pointed out that article 13(2) seems to be included in Part III of the Constitution by way of abundant caution and that article by itself does not confer any fundamental rights. It may thus be urged that amendment of article 368 on the lines proposed as above does not take away or abridge any of the fundamental rights and hence article 13(2) does not become attracted in the matter.

With due respect to the Supreme Court it is submitted that the power to amend the Constitution is contained in article 368 itself. Amendment of the Constitution is separately provided for in Part XX of the Constitution and article 368 specifically deals with the same. The power to amend the Constitution may be inferred from the words "the

prohibited by article 13(2) from amending the Constitution in so far as such amendment takes away or abridges any of the fundamental rights guaranteed by Part III of the Constitution.

For the aforesaid reasons it is considered that the adoption of the course to summon another constituent assembly by Parliament enacting a law for the purpose under article 248 and Entry 97 of the Union List, would lead to anomalous results and cannot, therefore, be considered prudent or appropriate in the matter. In view thereof it is not really advisable to adopt this course for the purpose.

The fourth course refers to the issue of a referendum to the electorate regarding the amendment of the fundamental rights guaranteed by Part III of the Constitution. In this connection it may be added that our Constitution does not contain any express provision for the holding of the referendum. The Goa, Daman and Diu Opinion Poll Act, 1966 cannot be treated as affording an analogy for the purpose. This Act was enacted by Parliament in exercise of its powers contained in articles 3 and 4 and had nothing to do with the amendment of the Constitution which is provided for under article 368 of the Constitution.

Further the number of the electorate to whom a reference may be made runs into millions. The question of heavy expenses to be incurred for the purpose is also relevant in the matter. Even if any such referendum be made to the electorates there would be very few members of the electorates who would be in a position to understand and follow such a complicated issue as the amendment of fundamental rights guaranteed under Part III of the Constitution. In any event, even if any such referendum be held the result of such referendum would necessitate the enactment of a law by Parliament under articles 3 and 4 of the Constitution. Such a law would again attract article 13(2) and cannot, therefore, take away or abridge any of the fundamental rights guaranteed by Part III. In view of all these difficulties this course is also not practicable and need not, therefore, be adopted in the matter.

The fifth and the last course which commends itself in the matter is the course relating to amendment of article 368 expressly providing that Parliament has power to amend the Constitution including Part III of the Constitution. Having regard to the majority decision as well as minority decision of the Supreme Court in *Golak Nath's* case it is considered that the amendment of article 368 may be broadly on the following lines:

- (i) The article must specifically provide that Parliament shall have the exclusive power to amend the Constitution.
- (ii) Provisions of Part III of the Constitution may be included in the proviso to that article.

ration at an early date. Supreme Court has held in *Saghir Ahmed's* case that "a statute void for unconstitutionality is dead and cannot be vitalized by a subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted." In view thereof it is submitted that by applying the doctrine of "prospective overruling" in the present case the Supreme Court has gone beyond the powers available to it under the Constitution.

It is further considered that the construction of the Constitution favoured by the Supreme Court as aforesaid would virtually result in giving rigidity to the provisions contained in Part III and that would go to affect the socio-economic development of the country. The Constitution must be construed not in a rigid and static manner but in a flexible and dynamic manner, having due regard to the social and economic development of the country and the ultimate aim at the achievement of an egalitarian society as contemplated by Part IV of the Constitution. In view thereof, it is submitted with due respect the view taken by the Supreme Court that "fundamental rights are given a transcendental position under our Constitution and are kept beyond the reach of Parliament" is not sound and needs reconsideration, more so when article 368 proposed to be amended as mentioned above would specifically provide for amendment of Part III taking away or abridging the fundamental rights contained therein.

The amendment of article 368 broadly on the lines referred to above has been suggested with a view to avoiding any conflict which might otherwise arise between two important organs of the Union, namely, Parliament on the one hand and the Union Judiciary on the other. Every effort should be made to see that these organs function in a harmonious manner consistently with the provisions contained in the Constitution.

In view of the above it is considered that the most appropriate course which may be adopted in the circumstances of the case is to suitably amend article 368 of the Constitution broadly on the lines referred to above. In this connection it may be noted that the Constitution (Amendment) Bill, 1967 by Mr. Nath Pai, M.P., also contemplates amendment of the said article. The said Bill has been referred to the Joint Committee of both Houses of Parliament, and is now pending before Parliament.

Simultaneously with the amendment of article 368 as proposed above such of the provisions of Part III of the Constitution regarding fundamental rights which definitely need amendment should be also duly amended. For example, the Land Acquisition (Amendment and



Constitution shall stand amended in accordance with the terms of the Bill" occurring at the end of the operative part of the article. No doubt the marginal note to article 368 refers to "Procedure for amendment of the Constitution". However, it is well settled that the marginal note cannot control the meaning of the plain words used in the article itself. Further the view that article 368 does not merely deal with the procedure for amendment of the Constitution but also contains the power to amend the Constitution gains support from clause (e) of the proviso to article 368 which contemplates amendment of the provisions contained in that article.

One more observation may be made regarding the doctrine of "prospective overruling" relied on by five of the judges giving the majority decision in *Golak Nath's* case. There is no doubt that this doctrine has been of late applied in the U.S.A. However, it is not clear how the doctrine can be made applicable in India in view of the express language used in article 13(2) of the Constitution. This article prohibits the State from making any law which takes away or abridges the rights conferred by Part III and further provides that any law made in contravention of the article shall to the extent of the contravention be void. Thus article 13(2) is absolute in making laws inconsistent with fundamental rights void *ab initio*. It may be noted that there is no provision similar to this article in the Constitution of the U.S.A.

The Supreme Court has held that the first, fourth and seventeenth amendment Acts abridge the scope of the fundamental rights and are, therefore, *ultra vires* the Constitution. If it is so, these Acts are void in toto and would thus be ineffective as from the date of their inception. However, relying on the above doctrine the Supreme Court took the view that these Acts would continue to be valid, but Parliament will have no power from February 27, 1967, the date of its judgment in *Golak Nath's* case, to amend any of the provisions of Part III so as to take away or abridge the fundamental rights.

It is submitted that any such construction of the Constitution aforesaid would go against the express language used in article 13(2) and would in effect amount to the making of law by the Court by the addition of some provisions in that article which are not actually contained therein. It is well-known that the function of the Court is to interpret and construe the provisions contained in the Constitution and not to make any addition or alteration thereto. In view thereof, it is submitted with due respect that the view of the Supreme Court, namely, that though the above three amending Acts were invalid, the decision of the Court would have only prospective operation as from the date of the judgment and thus the said Acts would continue to be valid, is unsound in law and requires reconsideration.

**D. K. Kunte:** I am in favour of taking another opportunity of going to the Supreme Court by creating a situation where we just pass some legislation by way of amending the Constitution, so that we are not asking them to review their judgment in the *Golak Nath's* case as such but giving them an opportunity to reconsider the situation. I say this for two reasons. First of all, we, especially our Founding Fathers, have in their best judgment adopted for us a written Constitution, wherein they have laid down the position that the judiciary shall interpret the law and somebody else might pass the law. Therefore, I would myself respect the judiciary for interpreting the law. And if we are to respect the judiciary for interpreting the law under the Constitution as it stands, the discussion of the last three days has pointed out that we have no remedy as a case. We will take no step by doing a thing which today might be wrong because of the latest judgment, though it was right in the light of the previous judgments, and, therefore, we would try to amend article 368 with all the care that the Law Minister had indicated by way of following the French model so that we are not bringing an omnibus amendment, like the seventeenth amendment. If we do that, then the Supreme Court might consider the matter, because after all, we are going to them again in all humility, that it is necessary. It would be difficult if one constitutional authority does not respect the other constitutional authority. Professor Tripathi's suggestion of passing a resolution, if acted upon, would mean we are directly opposing the authority of the highest judicial authority. Rather than do that, if we do this, we would be showing them that we want to respect them, yet bring to their notice that though they have decided in the *Golak Nath* case under article 13(2) that fundamental rights could not be amended, all the same all those previous amendments which have gone into the Constitution and accepted by the Court have in fact taken away the fundamental rights. This is resulting in an anomaly. So by taking another opportunity, we would again be pointing out to them that in case you cannot clothe the Parliament with such authority, future anomalies might arise.

**M. L. Jain :** I am one of those few who consider that the judgment in *Golak Nath's* case is only partially correct, because I believe that the doctrine of "prospective overruling" is in violation of article 13 of the Constitution. If the requirement of article 13 is that all laws which violate the fundamental rights, are unconstitutional, then they cannot be saved by a rule of interpretation such as prospective overruling.

Whatever be the merits of the decision, it is a law of the land and various suggestions have been put forward to get away from the consequences of this decision.

One of the suggestions is that a reference should be made to the Supreme Court under article 143, to advise as to the future action in the

Validation) Act, 1967 recently enacted by Parliament may be included in the Ninth Schedule to the Constitution by suitably amending article 31B for the purpose, so as to make that Act immune from challenge on the ground that it is inconsistent with, or takes away, or abridges any of the rights conferred by articles 14 and 31 of the Constitution. This amendment is all the more necessary in view of the recent decision of the Supreme Court in *Fishnu Prasad Sharma's case* and *Vajravelu Mudaliar's case*. If such amendment is not made the Central Government and the State Governments would be faced with the problem of paying huge amounts of money running into crores of rupees by way of further compensation in respect of lands already acquired by them in the past and it would not be possible for them to do so in view of the very difficult economic situation prevailing in the country at present. This amendment is required to be made after article 368 is duly amended broadly on the lines referred to above.

Amendment of article 368 and article 31B as referred to above should be considered as necessary or expedient in the national interest and should not be considered as a problem connected with or related to any political party in power either in the Centre or in the States. These amendments are called for and are really necessary in the larger interests of the country and with a view to harmonising the economic position prevailing in the country.

In the end I would like to add that I am conscious of the fact that the amendment of article 368 proposed as above would be liable to be challenged in the Courts as going against the majority decision of the Supreme Court in *Golak Nath's case*. However, the main purpose of my recommending amendment of that article as aforesaid is to reduce as far as possible the rigour of the majority decision in the said case. If article 368 is duly amended having regard to the proposal as referred to above and if such amendment is subsequently challenged by any party in the Supreme Court, it may be possible to induce the Supreme Court, by forming the full Court for the purpose, to reconsider its decision in *Golak Nath's case* in the light of the article so amended. In this connection it is considered that the chances of persuading the Supreme Court to reconsider the said decision cannot be ruled out altogether, more so when the majority decision in *Golak Nath's case* is given by six judges as against the minority decision of five judges. In the end it may be added that the amendment of article 368 on the lines referred to above is suggested with a view to minimising the difficulties arising in view of the majority decision in *Golak Nath's case* and having due regard to the observations made by the minority judges headed by Justice K. N. Wanchoo, the present Chief Justice of India.

declare itself sovereign and amend any part of the Constitution. It seems to me that the creation of a constituent assembly is not a legal but political fiat.

**P. N. Saprú:** I pointed out yesterday that what we have in the language of Lord Birkenhead is a controlled constitution, a constitution controlled by a written instrument and the Supreme Court is the interpreter of that constitution. I would refer to article 141 and article 144 which say that all courts must act in accordance with the opinions or judgments of the Supreme Court. I know that *Golak Nath's* case has created a great difficulty by making fundamental rights unchangeable. The Supreme Court appears to have forgotten that, as Lord Wright said, what it was doing was to expound the Constitution.

**M. C. Setalvad:** What is the remedy?

**P. N. Saprú:** I would suggest, and I think on legal grounds it is justifiable, an expansion of the Supreme Court by adding three judges. No one can avoid an unconscious bias.

I would also suggest that after the Supreme Court has been expanded a test case be made out and it should be asked to review on the point.

The second remedy I would suggest is that none of the directive principles may be given a place as fundamental rights. I agree in substance with the Law Minister when he says that it is possible to amend Mr. Nath Pai's Bill in such a manner as to make it more acceptable to everybody. You can refer to the Constitution of the Fourth Republic of France, you can refer to the Constitution of the Fifth Republic of France, you can refer to the Constitution of the new German Republic and you will find provisions of this character.

**M. C. Setalvad:** Can you tell us a way out?

**P. N. Saprú:** I am definitely opposed to the Legislature or Parliament passing a resolution in terms of Dr. Tripathi's suggestion.

**B. K. P. Sinha:** I think there are four ways open to us: amend the Constitution or convene a constituent assembly or hold a referendum or wait until the Supreme Court reconsiders its own judgment.

I agree with the remark of Mr. S. K. Das that what cannot be done directly cannot be done indirectly. Therefore amendment of article 368, even of article 13(2) in my opinion, would not provide a remedy in this case. Not only that, the endeavour suggested by the Law Minister, Mr. Menon, really is an endeavour to provide the Supreme Court with an excuse, with a face-saving device.

matter. This suggestion is not commendable because the Supreme Court may refuse to give advise, specially when the decision of the Supreme Court is already there in the matter.

Second suggestion is that article 141 should be so amended that in the constitutional matters, the decision shall be by the majority of more than one. If this suggestion is accepted, then the reversal of the judgment in *Golak Nath's* case will become all the more difficult. As at present, the judgments can be reversed by majority of one at any time in future. But if the article is amended as desired, then it will be all the more difficult to obtain reversal of the said judgment.

Third suggestion is that the matter should be settled by referendum. Such a complicated issue, in my opinion, cannot be settled by referendum in our country because most of our voters are illiterate and most of them will not know what they are voting for. Moreover, it is doubtful whether a referendum shall have any legal validity.

Fourth suggestion is that article 368 should be so amended that it may give Parliament powers to amend any provision of the Constitution including Part III. Any such amendment is likely to be struck down as unconstitutional as long as the judgment in *Golak Nath's* case holds the field.

Yet another suggestion was to pack the Court by increasing the number of its judges in order to obtain a judgment reversing *Golak Nath's* case. Such a suggestion casts serious reflection upon the integrity of the judiciary.

I can, therefore, think of the following solutions:

1. Nothing should be done for the present. But if and when any necessity is felt, then any of the directive principles may be included in Part III, because such an amendment of Part III will not be violative of Part III. It will not amount to taking away or abridging any fundamental rights.

2. If we are panicky, then the constituent assembly is the only solution. It will be remembered that the Constituent Assembly, which produced the present Constitution, was convened in pursuance of Cripps' Mission of March 30, 1942, and subsequently, reiterated in the Cabinet Mission proposals of May 16, 1946. It was not created by any law of Parliament but no sooner than it met in December, 1946, the first thing that the Constituent Assembly did was to declare itself a sovereign body. Therefore, if a constituent assembly is convened even by a mere resolution of Parliament, that will not be violative of fundamental rights because it is not a law, and that as soon as the constituent assembly is convened it can

(specifically, the right to property) in order to undo the effects of certain judicial decisions, it might be profitable to examine the question and the controversy that it has generated with reference to the relevant Constituent Assembly debates, the proceedings of the Provisional Parliament during the enactment of the first amendment, the discussion in Parliament on the fourth amendment and seventeenth amendment and also the previous judicial pronouncements in *Shankari Prasad's* and *Sajjan Singh's* cases, and the implications arising from all these source materials.

It would, then, at once appear that in the guidelines of constitution-making and operation as evidenced in the above-noted documents inhere a coherent philosophy espousing the cause of the 'common man' *vis-à-vis* that of the 'individual', assuming that there is a conflict between the two, sometimes, or, to put it differently, the concept of the individual has been refurbished by the idea of the social compulsions. Jawaharlal Nehru, Dr. Ambedkar, B. N. Rau, among others, can be quoted extensively in support of the theory postulating the primacy of the common man over the individual, especially when property becomes the bone of contention. If this be accepted, the Supreme Court's judgment in the *Golak Nath* case creates an unwarranted innovation. For, no new facts have emerged justifying the reversal of the Court's earlier decisions. Moreover, the verdict only tends to expose its tentativeness as K. N. Wanchoo's succession to K. Subba Rao as the Chief Justice might well lead to the restoration of the old position *i.e.*, *status quo ante* at the instance of any litigant in a similar case that comes up. But, I would not lean my argument on mere speculation, however well founded. But, as a remedy, it may be suggested, we might wait and see.

The split judgment by a majority of one subsumes an unprecedented tug-of-war between the legislature and the judiciary—an unreal war. In fact, both the Parliament and the Supreme Court are limited in their respective powers by the Constitution and the convention. The Supreme Court is supreme to the extent that article 13(2) empowers it to reject an ordinary law that seeks to abridge and not the one that amends fundamental rights. Normally, its decision will be final and Parliament has to respect it. The Supreme Court has also to see that the procedure of article 368 is observed by Parliament in the case of amendments and not their content. Yet, whenever a question of policy is involved, such as the promotion of general weal by Parliament by intervening to limit article 31 as it has done before, it should be made clear that it has the right to do so. Parliament can, and should, remove the legal obstacles in the way for what it considers to be the right policy for social progress and economic advancement. That this type of legislative supremacy has been accepted in theory and in fact is unexceptionable.

**M.C. Setalvad:** What is your remedy ?

**B. K. P. Sinha:** I do not believe that any amendment can cure the situation, nor, in my opinion, can a referendum. If the Constitution contemplates that the fundamental rights cannot be amended, they cannot be amended even by a referendum. Nor can they be amended by a constituent assembly. Moreover, there is a complete misunderstanding about the nature of a constituent assembly. A constitution marks the end of one era, one epoch and the beginning of a new one. The constituent assembly, unless it is provided for in some articles of the Constitution, does not get the power to amend certain articles of the Constitution. Therefore, I agree with the last suggestion that we should wait until the Supreme Court reconsider its decision in course of time. The suggestion of the Law Minister really amounts to providing the Supreme Court with a face-saving device to go back on their own judgment. Therefore, my view is that we must wait for a proper opportunity. That opportunity would not be long in coming. I am sure after all that has been said in the country about this judgment and realising the difficulties that have been created by this judgment, the judges, human beings as they are, may be persuaded to review their judgments, as the judges of the American Supreme Court were persuaded when President Roosevelt thought to appoint some Judges so that the Supreme Court changes its order.

**M. C. Setalvad:** Mr. Menon's suggestion provided them with an opportunity of doing what you are saying.

**B. K. P. Sinha:** That is what I said. There is something like committing a fraud on the Constitution for providing an opportunity to the Supreme Court to review its judgment.

**M. C. Setalvad:** Now we have got your remedy. Anything more ?

**B. K. P. Sinha:** We really perpetrate fraud on the public if we amend the Constitution. I do not find any reasons to have fears which the Law Minister or the previous Law Minister spoke yesterday that if Parliament's power is restored then there may be a difficult situation. I am surprised at one word which the present Law Minister used that the Parliament has been slipshod in introducing amendments. It has never been slipshod and on every occasion that arose in the past, considerable thought and deliberation went into those amendments. Therefore, my suggestion is let us wait for a proper time for review which shall be coming very soon. I am sure the Supreme Court as constituted today will change its mind.

**M. M. Sankhder:** In view of the recurrence of the legitimacy or otherwise of the Parliament's competence to amend fundamental rights

conditions of seething poverty in India is to invite bloodshed and disorder. That, I believe, is the danger inherent in the Supreme Court's judgment and can be warded off by the remedy proposed above, by footing a bill in Parliament to this effect.

**S. S. Khara:** I think Smt. Kapoor's was a much needed reminder. It underlined the importance and significance of what we are discussing. I share very much her position. I submit that we should come here, in this convention with as clear-cut a recommendation as possible. I think Parliament needs it and the country needs it. I believe that the way out lies somewhere in the positions taken by Pandit Kunzru, Mr. Kunte and Dr. V.K.R.V. Rao, subject always to the internal contradictions that always haunt Dr. Rao. I think the best way out is Pandit Kunzru's alternative No. 2, *i. e.*, to ask the Supreme Court to advise as to what steps should be taken to restore to Parliament the powers which the Constituent Assembly thought it had. *That I think is a vital thing. I believe this suggestion has the following merits:*

- (1) We would have the change which is needed.
- (2) We would have it with the speed which is necessary. I do not share this "let us wait and see" business.
- (3) It would have the very great merit of exhausting the legal process. I do not think this has been emphasised sufficiently.
- (4) It would avoid the danger of a head-on conflict. This country has already seen one or two head-on conflicts between the judiciary and the legislature. It is a dangerous thing and should be avoided.
- (5) It would avoid the danger, which haunts many of the speakers, of further striking down of legislative enactments whether it is constitutional amendment or ordinary law.
- (6) It leaves the legislative options open to us. That to me is very important. We should not close the legislative options. We can come back and amend the Constitution any time and in any manner we like.
- (7) It would render the idea of packing the Court unnecessary. I believe this talk of packing the Court is a dangerous concept.

**Shrimati K. Hingorani:** I was inspired this morning after listening to various speakers, to say a few words. I feel that the Supreme Court should be given another opportunity to correct itself. After all, there has been a great amount of public agitation and various views have been expressed. This Convention itself will highlight the views of the



The majority judgment in this light is hostile to the well-established constitutional relationship.

The present controversy stems from the perfection of a lacuna in the Constitution. While article 368 impliedly permits amendatory legislation in regard to fundamental rights, article 13(2) forbids such a course. The dispute unnecessarily hinges on the interpretation of the word 'law' in article 13(2). The question, for all intents and purposes, had been settled previously when the Supreme Court acquiesced in Parliament's authority to amend article 31 in 1951, 1955 and 1964. The revival of the issue by overruling earlier decisions means not merely a spate of avoidable litigation but also putting a stop to ameliorative legislation.

If a corrective is to be provided to remove difficulties for future which lie in the judiciary's prospective overruling authority and its refusal to recognize the transcendental nature of legislative power in a parliamentary democracy, it would be essential in the present context to amend the Constitution. Doubtless, in the ultimate sense, the interests of the people are represented by Parliament, and however much we might sophisticate and twist facts or quibble about legal niceties the basic assumption of our pattern of democracy cannot be belied. The absence of the 'due process' clause in the Constitution lends weight to this contention. Besides, the judiciary has not been invested with review of some cases relating to property. It is, therefore, unfortunate that article 31 should remain in Part III. It may finally be suggested that the devices proposed by some such as the convening of a new constituent assembly or arranging a referendum are not only fantastic but also extra constitutional. The sole remedy, it seems to me, lies in amending article 368 which permits its own amendment in such a way that article 31 is taken out of Part III and placed in Part IV where it ought to belong and is included within the entrenched provisions of the Constitution.

Thus, normally the right to property would be protected against legislative encroachment. But, in exceptional situations, if the Parliament insists and persists in curtailing it, it might well do so by resort to a difficult process of amendment rendered more difficult by the considerable reduction in one party majority at the Centre and to existence of non-Congress Governments in several States.

The Directive Principles of State Policy can be given a meaning in case the Government is able to muster sufficient strength. The people as final judges of the acts of Parliament can give their verdict at the poll. The legal hurdles will not be there.

The doctrine of the inviolability of property rights has been consistently exploded by the new concepts of social justice. To obviate it in the

(2) After ascertaining the wishes of the people of India by such a referendum, Parliament may in its residuary power vested in it by Entry 97, List I of the Seventh Schedule read with article 248 call for a Constituent Assembly to formulate the necessary amendment of the Constitution.

(3) Such a Constituent Assembly shall consist of the members of both Houses of Parliament and ten members duly elected from among each of the Legislatures of all the States, in proportion to the strength of political parties functioning in such Legislatures at the relevant time.

The law as to referendum may be duly enacted under article 368-A aforesaid, empowering the Election Commissioner of India to hold the referendum as to the particular issue to be placed before the people. The Election Commissioner shall ascertain from each voter his answer to the question as 'Yes' or 'No'. If he finds that more than two-thirds of the total number of voters have answered the question in the affirmative, he shall record such a finding and recommend to Parliament the need for calling a constituent assembly as envisaged in the proposed article 368-A. By two-thirds of the total number of voters is meant as in the voters list and not from among the voters who actually polled. If more than two-thirds of the voters did not turn up for the poll, it must be then deemed that the people are for the status quo.

All this is new and cumbersome. It is also costly to the nation. This should be a deterrent to any fetish for constant or needless tampering with the Constitution. But there is no escape from it if you want changes in the basic and essential structure of the Constitution.

The power to do this is contained in article 248. We may avail of this power with profit to solve the situation.

**Raghubir Singh:** The remedy that is open to us is to look up to the Supreme Court itself to further elucidate the matter, because a perusal of the judgment shows that the Supreme Court judges themselves have differed in many respect. The composition of the Court will be changed after some time. There is no reason that the Court will not overrule *Golak Nath's* case. The *Bengal Immunity* case is an instance of some of the judges changing their mind to overrule the earlier case. Other remedies which are being suggested in this Convention are too strong. There may be reactions against them and they may create further conflicts more serious than the malady. Therefore, the matter should be left in a way that nature may cure it in course of time. I am sure it will bring about a cure.

parliamentarians, the lawyers, the public and of the laymen; and I do feel that another opportunity should be given to the Supreme Court but after a little lapse of time. Eleven judges have already given their views. Their minds might not be open to change if an opportunity is given too soon. There should be, if possible, and if the funds permit, an addition of two judges, and if that is not possible then enough time should lapse so that some of the judges who have already given their opinions are retired.

I feel that the suggestions given by the Law Minister Mr. Menon, are also other alternatives but there again I would advise a lapse of time so that the two suggestions that I have made have taken shape and that we do not have any dead-lock.

**V G. Ramachandran:** As to the remedies for the situation created by the *Golak Nath* case it is best not to get panicky. There is no hurry to go in for any amendment of the Constitution. You may wait till the Supreme Court further considers the position on a suitable occasion.

I venture to agree in the main with the observations of the Law Minister, Mr. P. Govinda Menon. If Mr. Nath Pai's Bill becomes an Act, there will certainly be an opportunity for the Supreme Court to have a second look on the *Shankari Prasad* and *Sajjan Singh* cases.

It is, however, erroneous to think that article 368 contains any constituent power. If the Supreme Court again upholds *Golak Nath's* case, the only remedy is to go to the people. Mr. Justice Hidayatullah's suggestion as to constituent assembly has to be further studied. A constituted body like Parliament cannot create a constituent body like a constituent assembly. In my humble opinion I have pointed out the remedy in my paper contributed to this convention. To state it again, for enabling all this, a preliminary requisite is a referendum. For this, a new provision as article 368-A has to be enacted by Parliament by the method and process postulated in article 368. The new article 368-A may contain words to the following effect :

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| Art. 368-A Ascertainment of the people's views by means of a referendum. | (1) Where it is necessary to<br>(a) amend any of the rights postulated in Part III of the Constitution;<br>(b) or to ascertain the wishes of the people of India in a matter of special constitutional importance, not solved by any of the existing constitutional provisions, a referendum may be caused to be effected by law. |
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—that Parts III and IV constitute an integral scheme...” which “is made so elastic that all the Directive Principles of State Policy can reasonably be enforced without taking away or abridging the fundamental rights.” Instead, therefore, of trying to get the decision nullified one way or another, we should wait and see whether judicial interpretation and application of *our fundamental rights uniformly accords with the directive principles*. It is only when the judiciary fails in this regard will it be time to think of somehow setting the decision at naught.

The question will then arise as to how this is to be accomplished. Of all the suggestions made at the Convention and outside, only two need be considered : These are (i) to seek the Supreme Court’s reversal of its own decision ; and (ii) to convoke a constituent assembly for suitably amending the Constitution.

Courts are always slow to reverse their own decisions and rightly so, as otherwise they would be exposed to the charge of fickle-mindedness ; and case-law would be thrown into bewildering uncertainty. This would be more true when a complete complement of the highest court of the land has arrived at a conclusion (albeit not unanimously) after full deliberation. Consequently, those seeking a reversal of the decision will probably have to wait indefinitely long.

The idea of a constituent body seems more plausible. But the question is how is it to be convoked and by whom? Can Parliament do it? The measure of sovereignty delegated to Parliament and the State Legislatures is found in our Constitution. Justice Hidayatullah declares that, under item 97 of List I of the Seventh Schedule, this measure includes the power to convoke a constituent assembly. I respectfully submit to the contrary. The power to convoke a constituent assembly transcends the powers of ordinary legislation even more than does the power to amend the Constitution. If Parliament had that power, what would prevent it from converting itself into such an assembly and effecting by a simple majority what it could not do even by a special majority? I, therefore, venture to suggest that representatives of all political parties and of all nation-wide bodies—social, educational, professional etc.—should meet in conference and should decide upon convening a constituent assembly, and then proceed, through the instrumentality of the Government, to have the assembly elected by the people through *adult franchise*. No doubt, in doing so, the conference would be assuming the necessary measure of sovereignty from the people. But the latter must be deemed to have acquiesced in the assumption by the election that would follow. Doubtless, again, the scheme is fraught with difficulties. But I feel that they are not insurmountable.

**Piloo Mody:** I am not a lawyer and I, therefore, do not have any legal remedies to offer. I have absolutely no doubt, judging from his past performances, that the Law Minister will be able to find the remedy.

**O. N. Mahindroo:** According to article 141 the latest judgment is always the declared law and according to article 137 it can always be reviewed by the Supreme Court itself if and when the occasion arises. But as things are, there is actually no remedy because in *Golak Nath's* judgment, it is said that the judges do not make law, they merely discover the correct law if and when it is brought to their notice. The judgment is right and ought to be followed. But if and when there be need and opportunity, we must have a referendum for which ways and means can be found out by the Law Minister.

**S.J.S. Fernandes:** Admittedly, the Constitution nowhere expressly confers power to amend it. However, in order to respect the rule of interpretation, that, as far as possible, every provision of law should be given due effect and none should be rendered inoperative, a provision which lays down a procedure for exercising a power must be deemed to imply the existence of that power. Hence article 368 implies the existence of the power of amendment. The question is, which provision confers it, albeit by implication?

It cannot be article 248 because: (a) it was inserted for the purpose of providing for any subject, which (in spite of the exhaustive enumeration) was not envisaged at the time, but which might crop up in the unforeseeable future; and amending the Constitution was very much in the minds of the framers; and (b) it being a replica of the last item (97) in List I of the Seventh Schedule, when the rule of '*ejusdem generis*' is applied in interpreting it, it would mean that item 97 (and hence article 248) can embrace only subjects for ordinary legislation (as are all the specified items), and not one (like constitutional amendment) that is a matter for extraordinary legislation. There being no other article including article 4(2), which confers the amending power it could only be read implicit in article 368 itself. This conclusion is reinforced by the opening phrase and closing clause of the article. But the rule '*generalis specialibus non derogat*', might be extended so as to hold that a later general provision in an Act (article 368) does not abrogate an earlier one (article 13) by mere implication? In other words, the power of amendment implied in article 368 should be read subject to the prohibition contained in article 13(2). I do not agree with all those who view the majority judgment as against national interest. The critics, as well as the supporters, of the decision lose sight of the crucial dictum in the judgment of Chief Justice Subba Rao that "the immutability of fundamental rights" is "subject to social control"

## Concluding Session

*Chairman:* S. K. Das

**L. M. Singhvi:** As we draw to a conclusion of the Convention, we would listen to the reports of the four business sessions which have preceded this concluding session. These reports, which would be placed before you by the rapporteurs for the particular business session would neither be a summary nor by any means an exhaustive description of the discussions. It would be only an attempt to indicate the trend of discussion and also to give a comment of the rapporteur himself.

After the rapporteurs have given their reports, and unless there are any particular suggestions in respect of some of the remarks I am going to make, or what the rapporteurs are going to say, we might then request Mr. S. K. Das, who is chairing the concluding session, to give us his concluding address.

It has been said that our Constitution represents an inter-section of politics and law. The Convention has been at the heart of this inter-section. In the course of our discussions we have deliberated on every conceivable aspect of the complex and kaleidoscopic subject of fundamental rights and their amendability under the Constitution as interpreted by the Supreme Court in *Golak Nath's* case and otherwise. We can look back on these deliberations, if I may say so with a sense of satisfaction, because by common consent the Convention represents an excellent amalgam of scholarship, erudition, practical statesmanship, searching intellectual analysis and unflinching candour. If I may say so, this has been a unique event and the sponsors and the participants may justifiably feel gratified.

It was not the purpose of the sponsors to canvass any particular thesis or viewpoint. What we had set out to achieve was a critical

**M.C. Setalvad:** And that concludes the list of speakers. This discussion has been so illuminating and so thorough that no summing up by the Chairman is necessary.

**Shrimati K. Hingorani:** Mr. Chairman, may a lady have the last word; I just wanted to say that on important issues which touch the power of any of the organs under the Constitution, for instance the Parliament or the Court, there should be unanimous decision of the Court and not a majority decision. That is to say any decision that purports to take away or abridge the rights of any one organ should be of a full Court unanimously agreeing on the question under consideration.

## Concluding Session

Chairman: S. K. Das

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examination and a constructive inquest, and this I think, I am correct in claiming in abundant measure for the Convention.

The essence of our objective was to secure a deeper awareness and a distinctive analysis. It is not necessary, therefore, for the concluding session to proclaim a consensus, in my own humble opinion.

A wide range of suggestions and recommendations have been mooted at the Convention. This would not only be rich material for research scholars and constitutional pundits, but would also be of great utility to Parliament and more particularly to the work of the Joint Committee of the two Houses of Parliament, which has been specially constituted to examine this question. If you all agree, we will transmit the verbatim record of our proceedings to Joint Committee of Parliament, after it has been duly edited.

As Mr. S. K. Das, our distinguished Chairman, reminded us on the opening day, when all is said and done, we have to remember that the law declared by the Supreme Court is for the time being the law of the land and is binding. Perhaps our Constitution has in effect adopted the adage that the Constitution is what the Supreme Court says it means. There has thus come about in *Golak Nath's* case a confrontation between the judiciary and the legislature. Conflicts, such as these, I submit are inherent in constitutional government and in constitutional processes and one cannot afford to despair of them. Indeed these creative tensions of competing principles and competing institutions can, if properly canalised, be of a source of constructive building up and strengthening of the constitutional processes in our country. I, therefore, would like to enter a plea here for a viable and workable reconciliation between these competing principles as well as between the apparent, but not real, conflict, I like to think, between coordinate organs of the Constitution. I feel that such a viable reconciliation or the task of achieving such a viable reconciliation would be facilitated by the discussions we have had in depth of this subject. And towards this purpose I am sure that all the resources of legislative statesmanship and judicial self-restraint would be available in our country, in order to achieve as a result of this confrontation a viable reconciliation.

I am grateful to you, Mr. Chairman, particularly for the very valuable contribution you made at the opening session and at the various sessions of the Convention. I am grateful to you for having agreed to the most difficult task of presiding at the concluding session where you would be in a sense the 'Spokesman of the Convention'.

I am also grateful on behalf of the Institute and the other sponsors, to all the participants who have given so generously of their time and who have found it in the midst of their preoccupations to come here and make contributions.

Having said this and having thanked various participants, as well as members and the Chairmen of the Presidium Panels, I would now request that we take up the reports of the rapporteurs.

## REPORTS ON BUSINESS SESSIONS

### I. Report of the Opening Session

*Chairman* : M. Hidayatullah.

*Rapporteur* : T. K. Tope.

Mr. Justice M. Hidayatullah, Chairman of the Session, posed the following issues before the Convention :

- (1) Are there curbs on the power of Parliament to amend the Constitution ? Yes. Article 368 shows this.
- (2) Which of the two views about the meaning of the term 'law' in article 13 expresses the intention of the Constitution-makers?
- (3) Fundamental rights are justiciable, while the directive principles are not. What is the meaning of placing two such provisions side by side ?

He then pointed out that judges have nothing to do with the political aspect of the question that comes before them for decision and that the judgment in *Golak Nath's* case was not influenced by the number of amendments made during the last 17 years. He also pointed out that the doctrine of 'prospective overruling' was not a new doctrine. He, however, wanted the Convention to consider whether the doctrine should be available for constitutional interpretation.

Mr S. K. Das raised the point whether the principles laid down in *Golak Nath's* case will foster the aims enshrined in the Preamble and pointed out that some of the fundamental rights ought to be inviolable. He did not approve of the suggestion to convene a constituent assembly or to amend article 368 to overcome *Golak Nath's* judgment. The Court should reconsider the point. It is for consideration of the Convention whether a marginal judge should be allowed to tilt the balance and further whether Chief Justices of the High Courts should be associated with the Supreme Court judges when important decisions like the *Golak Nath* are to be given.

Acharya Kripalani pointed out that the idea of fundamental rights is antiquated idea. He referred to the moral aspect of the question and said that Parliament cannot be equated with the people. The chapter on fundamental rights is not scientifically drafted for there are certain basic rights such as freedom of speech. He approved the idea of calling a constituent assembly.

For Mr. N C. Chatterjee the procedure for the amendment of the Constitution was flexible. The changing conditions would need new solutions. Fundamental rights can be amended. He agreed with Mr. Seervai's comments on the *Golak Nath* case and pointed out that the doctrine of prospective overruling has no place in our Constitution. He did not approve of the idea of convening a constituent assembly, but recommended recourse to article 143 by the President.

Points that emerged out of discussion were:

- (1) The doctrine of prospective overruling was not accepted by the majority.
- (2) Majority view in the *Golak Nath* should not remain law. But there was no unanimity as regards the mode of setting aside the judgment. (i) Amendment of article 368; (ii) The Supreme Court to review the judgment; (iii) Convening a constituent assembly; and (iv) Seeking of Advisory Opinion, were suggested.
- (3) Certain fundamental rights should be considered as basic such as freedom of speech etc.
- (4) What should be the majority required for overruling its earlier judgments of the Supreme Court and whether Chief Justices of the High Courts should be associated with the Supreme Court in important cases.

## 2. Report of the First Business Session

*Chairman :* A. K. Chanda

*Rapporteur :* V. K. N. Menon

The first business session of the Convention was devoted to the consideration of the quality and content of constitutional amendments, the nature of fundamental rights and the amendability of the Constitution.

After Dr. L. M. Singhvi, the Chairman of the Institute, had explained the scope of, and procedure for, the session, Mr. A. K. Chanda took the chair and briefly set forth the nature of the problems for discussion indicating also his own lines of thinking on them.

Fifteen speakers took part in the discussion. In the course of the discussions the following points were mentioned, some of them diametrically opposed to each other; but this was only to be expected on so important a subject. The more important of them may now be mentioned.

(1) There was an opinion expressed that the intention of the Constituent Assembly, as revealed in the debates, was that no article of the Constitution should be incapable of amendment. In this connection it was also pointed out that the first amendment (affecting fundamental rights) of 1951, was made by the same body of persons as the Constituent Assembly and with the same leadership; the membership changed only with the first General Election of 1952. On the other hand, some took the view that, even looking to intentions, fundamental rights were meant to be excluded from the three modes of amendment prescribed in the Constitution; our courts, anyway do not examine 'intentions'.

(2) Another line of thinking was that, apart from what the Founding Fathers intended, time and circumstance will require that every Constitution is amended. Parliament and the public are also better judges of what the changing needs of society are than judges. In this connection what was described as 'a hasty conglomeration of rights' was mentioned. It was also argued that no Constitution could be expected to provide for all future contingencies. But it was stated to the contrary that we are concerned only with what the constitution says in so many words. Further, to some, even what it says is good and sufficient, taken also along with the consequences of only 'prospective overruling'.

(3) Apart again from the question of intention, a view expressed was that the document, as it stands, excludes amendments to Part III. The opposite view was that Part III was amendable, even looking only at plain meaning of the relevant words in the concerned articles. The difference of opinion turned on the meaning of the word 'law' in article

13(2), and the meaning and relevance of the word 'procedure' in the marginal note to article 368.

(4) Some of the participants stressed the importance of Part IV of the Constitution—the Directive Principles of State policy—and the need to reconcile these with fundamental rights. They pointed out that the first, fourth and seventeenth amendments were for the purpose of implementing the former. The opposite view emphasized the constitutional non-justiciability of the directive principles.

(5) One speaker stressed certain anomalies which will arise if an amendment of article 368 attempted to set aside the majority decision in *Golak Nath's* case. These were the anomalies pointed out by former Chief Justices—Kania, Gajendragadkar and Subba Rao—and Justice Hidayatullah in their judgments in the concerned cases. Moreover, as another member said, can an amendment of article 368 do indirectly what it cannot do directly, and what follows if it is also vetoed by the Supreme Court?

(6) Another participant's argument that the power of amendment of any article must ultimately be found in itself.

(7) Other trends in the discussion related to proposals for a clarificatory advisory opinion to be sought from the Supreme Court, a new constituent assembly and a referendum. On each divergent opinions were expressed and for each reasons were adduced for and against what if the Supreme Court declined to give the opinion, or gave the some opinion as the majority in the *Golak Nath* case, and in either case, where do we go from there? Where is the constitutional authority to call a constituent assembly or order a referendum even apart from other difficulties of other like constitutions. Also, can a constituent assembly called by Parliament do what Parliament itself cannot do?

(8) In conclusion, it may be mentioned that matters like 6 against 13, and even the well known saying that a stitch in time saves nine, did not fail to be mentioned in the course of a long and learned, vigorous and absorbing debate.

### 3. Report of the Second Business Session

*Chairman* : N. C. Chatterjee

*Rapporteur* : C. B. Agarwala

Though it was intended that in this session particular attention would be given to a consideration of the nature and extent of the limitations on the Supreme Court's power of judicial review with particular

reference to the constitutional amendments, of the doctrines of *stare decisis*, prospective overruling and acquiescence, the speakers addressed the gathering practically on all aspects of the Supreme Court's decision in *Golak Nath's* case.

With the exception of one or two speakers who defended the majority judgment in *Golak Nath's* case, the consensus of opinion seemed to be critical of it. The majority judgment was described as having opened a Pandora's box, in having brought out a situation that seemed almost insoluble. It was pointed out by Pandit Hirday Nath Kunzru, a member of the Constituent Assembly and one of the Founding Fathers of the Constitution who is happily still with us, that no member of the Constituent Assembly ever thought that fundamental rights were not subject to the amending power of the Parliament under article 368; that every one took it for granted that like every other article of the Constitution, the chapter on fundamental rights was also subject to amendment. He expressed the view that he was surprised when he came to know of the view taken by the majority of the judges of the Supreme Court in *Golak Nath's* case that the chapter on fundamental rights was immune from amendment.

Mr. B. K. P. Sinha, stated that though he was not a member of the Constituent Assembly, he has been a member of Parliament since 1950 and he was present when the first amendment of the Constitution was moved and passed in the year 1951. At that time no member of Parliament, among whom were those who were the members of the Constituent Assembly, ever said that the fundamental rights were intended to be immune from the amending process laid down in article 368. Many of those who spoke in the session pointed out that society was not static, it was dynamic and was changing rapidly; that with the change in circumstances even the fundamental rights require changes and that Parliament which was representative of the people was intended to, and must, have the power to effect modifications in the provisions of the Constitution including the fundamental rights as experience showed the necessity for change. It was pointed out that though the fundamental rights were not to be lightly abridged or taken away and were very important, the Parliament must have the power to modify according to the requirements of the times and specially to give effect to the principles of state policy as laid down in part IV of the Constitution. It was pointed out that probably there would have arisen no necessity of amending article 31 of the Constitution adding article 31A and 31B thereto, if the Supreme Court had interpreted the article in the light of the directive principles which though not enforceable in a court of law, were yet fundamental in the governance of the country. The power to amend, it was stated, must not be confused with the exercise of that power. Though the

exercise of the power to amend fundamental rights must be very sparingly resorted to only in a case of utter necessity, the existence of the power must not be denied to Parliament.

One member expressed the opinion that social reform could have been effected within the limitations of the fundamental rights as they were originally passed by the constituent assembly and there was no reason for Parliament to rush in to amend the Constitution. But this opinion was not shared by any other member. It was stated that article 368 not only laid down the procedure of amending the Constitution, but also provided for the power to amend, when it declared that on following the procedure laid down in the article, the Constitution shall stand amended. There was a well-known distinction between legislative power and constituent power and a law made in exercise of the amending power under article 368 could not be said to fall under article 13(2) which referred to laws made in the exercise of legislative power. The power to amend the Constitution could not be located in articles 245, 246 and 248 read with the residuary Entry 97 in List I of Schedule Seven, as they related to ordinary legislative powers of Parliament.

On the whole the consensus of opinion was that fundamental rights were amendable under article 368.

On the question of the nature and extent of judicial review of the Supreme Court, though a suggestion was made that the Supreme Court should not overrule its previous decisions on the amendment of the Constitution by a bare majority of one, did not seem to find universal approval. It was pointed out that the Indian Constitution was a 'controlled constitution' where the Parliament and the State legislatures had enumerated powers and were not absolutely sovereign, there has to be judicial review by the Supreme Court of all acts of Parliament and legislatures as well as of the Executive, and that in this respect no limitations can be put on the powers of the Supreme Court. But at the same time, the Supreme Court must put self-denying limitations on its own powers and must interpret the Constitution as a constitution, as a document embodying the culture and social and political philosophy of the nation and not an ordinary legal document.

As regards the doctrine of *stare decisis* and prospective overruling, it was pointed out that in deciding the cases that come before them the courts have applied the doctrine of *stare decisis*, that is, not departing from an interpretation of law made by the Court in the past, even though wrong, where doing so would unsettle numerous transactions and fiscal and other arrangements that took place. So even though in the Court's opinion Parliament had no power under the Constitution to amend fundamental rights, yet the Court having held in previous judgments that the said Acts

were valid, and acting under the belief that the Court's previous opinions were valid, laws had been made bringing about an agrarian revolution in the country (*Zamindaries, inams and intermediary estates* had been abolished, vested rights had been created in favour of tenants, consolidation of land holdings in villages had been made, ceilings on lands were fixed and surplus lands had been transferred to tenants) it would create chaos and unsettle things in the country, if the Acts amending the fundamental rights' chapter were retrospectively declared to be *ultra vires* and invalid. The Court was, therefore, right in declining to declare the Acts already passed as invalid. The Court, however, declared that in future, the fundamental rights will not be abridged or taken away as upon their interpretation of the provisions of the Constitution this was not possible to be done. As the Court's view as to the unamendability of fundamental rights was correct, the Court had no other alternative but make the declaration as they did. An opinion was also expressed, that having held that the Parliament had no right to amend the chapter on fundamental rights, they were bound to declare, in view of article 13(2) of the Constitution that the amendments were void *ab initio*.

On the question as to what steps should be taken to empower parliament to amend the chapter on fundamental rights no view was expressed in this session as the subject was to be discussed in detail in the next session.

#### 4. Report of the Third Business Session

*Chairman:* M. C. Setalvad

*Rapporteur:* P. K. Tripathi

At the outset Dr. L. M. Singhvi suggested that speakers might strictly confine themselves to the consideration of the remedies to be recommended. He drew attention to the various alternative remedies already suggested during the course of the proceedings of the earlier sessions and proposed in the papers submitted. Mr. M. C. Setalvad said that for the discussions in this session it might as well be assumed that the judgment of the majority in the *Golak Nath* case is the law of the land and we should, therefore, confine attention to the remedies.

The remedies suggested so far, he said, fell broadly in two broad categories; the one that the Constitution, and especially article 368 should in some way be amended; and second, that some restriction should be placed on the Supreme Court as to the manner in which it could turn down a constitutional amendment. This restriction may take the form of requiring a special majority. The suggestion that a constituent assembly be convoked for amending the fundamental rights as suggested in one of the opinions delivered for the majority was very exhaustively discussed. It was pointed



out by many speakers that what could not be done by Parliament by a two-thirds majority could hardly be conceived to be within the powers of a constituent assembly convoked by the same Parliament. The law made by a constituent assembly convoked under article 248 will be subject to the provisions of Part III of the Constitution in the same manner and to the same extent as any other law passed by Parliament. The constituent assembly will pass such a law only by a simple majority whereas an amendment under article 368 is made by a majority of not less than two-thirds of the Members of Parliament present and voting. It was also pointed out that the very nature of a constituent assembly does not derive its authority from any legislature or law or Constitution. By this very definition it is a body which can pass and enforce a Constitution. No body of persons whether elected or otherwise which is in a position to prepare and enforce a constitution will be a constituent assembly.

The consensus of opinion on the whole was clearly against the advisability or legal soundness of a constituent assembly being convoked as suggested in one of the majority opinions. The other suggestion discussed at great length was as to the amendment of article 368 of the Constitution. Suggestions under this head took many forms. According to one, article 368 should be so amended as to entrench the fundamental right as suggested by Chief Justice Gajendragadkar in *Sajjan Singh's* case. Others took the line that, as proposed by Mr. Nath Pai in Parliament, article 368 should clearly provide that any part of the Constitution can be amended. This suggestion claimed the merit of meeting the difficulty created by the majority view in the *Golak Nath* case that article 368 laid down only the procedure for amendment. A slight modification of this was suggested by another participant who would state the power of amendment in article 368 but not so prominently as suggested by Mr. Nath Pai. According to this view article 368 should have a clause like the corresponding provision in the Irish Constitution. That is to say "any provision of this Constitution may be amended in accordance with the procedure laid down hereafter." After a good deal of discussion the consensus of opinion seemed to be that as long as the majority opinion in *Golak Nath's* case stands any attempt to introduce in article 368 the power to amend Part III of the Constitution will fall foul of the holding of the majority of the Supreme Court; and it will make no difference whether this attempt is made either by directly providing that Part III is amendable or by amending the text of article 368 in a less direct manner.

One suggestion was that the majority decision in the *Golak Nath* case need not cause any great panic and we should give time to the Supreme Court itself to change it. It was suggested that the majority opinion was a result possibly of a difficult compromise amongst the judges

who subscribed to the opinion and it is very likely that had the authors of the majority opinion pressed the point further and insisted upon declaring the seventeenth amendment unconstitutional, some of their concurring colleagues, however, would have dropped behind. The best policy, therefore, would be to wait and give the Supreme Court the opportunity of further considering their opinion. At least we could wait until the Supreme Court actually turned down the amendment of Part III of the Constitution.

Meanwhile, Parliament could express its disagreement with the holding of the Supreme Court not by passing an amendment which will be liable to be struck down by the Supreme Court but by passing resolutions reaffirming that it had the power under article 368 as it stands to amend any part of the Constitution including Part III.

The suggestion that amendment of the Constitution may be effected by referendum was discussed at length. One objection pointed out to this procedure was that there was no authority for holding a referendum under the Constitution as it exists. Many other difficulties were pointed out in connection with holding a referendum like the vastness of the electorate comprising nearly 250 million voters and the expenses involved. The suggestion that the legal difficulty may be overcome by the analogy of the opinion poll held in Goa was mooted. It was pointed out, however, that the opinion poll in Goa was a different matter both as to legality and magnitude. The consensus of the participants, therefore, was against holding a referendum.

It was suggested that the Supreme Court may be asked to express its opinion once again on the question of the power of amending fundamental rights by virtue of the provisions of article 368. A number of ways were suggested as to how this question is to be taken to the Supreme Court. One suggestion was that the President should make a reference to the Court under article 143. It was pointed out, however, that the Supreme Court was not bound to give its opinion under article 143 and this would present an additional difficulty besides the one already existing that a majority of the judges of the Supreme Court have only very recently decided that the power does not exist under article 368. Another suggestion was that a test case might be taken before the Court for the purpose. It was suggested that Parliament should actually amend the fundamental rights so that the case could go before the Court. Yet another suggestion was that the Supreme Court should be requested to show ways as to how the power of amending fundamental rights which the Constituent Assembly always felt was conferred under article 368 should be restored in view of the recent decision.

It was, however, pointed out that all these suggestions would amount to asking the Supreme Court to consider a decision within less than a year of its making the pronouncement and it was very unlikely that the Supreme Court will change its opinion so soon.

Advisory opinions would be under a further disadvantage that they could not overrule a decision pronounced in a contested case by the Supreme Court. No clear cut opinion seemed to emerge on the question of referring the matter once again to the Supreme Court either under article 143 or any of the other devices suggested.

Some suggestions as to changes in regard to the Supreme Court itself were also discussed. One suggested that a special majority should be required in the Supreme Court for turning out an amendment of the Constitution. Another suggestion was that all the judges of the Supreme Court must always sit in constitutional cases. Yet another suggestion was that a separate Bench of the Constitution larger than the present Constitution Bench should permanently be entrusted with the work of constitutional interpretation.

The suggestion was even made that the number of judges of the Supreme Court should be increased to its optimum level of 14. None of these suggestions were however sufficiently favoured.

**R. C. S. Sarkar:** We have had this discussion for the last three days. On the first day we had a general discussion about the issues involved in *Golak Nath's* case. In the second session, we discussed the question of the quality and content of constitutional amendments. The idea was to find out how far Parliament had exercised its power in the past, and whether it can be entrusted with the power of amending fundamental rights in future. With that end in view, the quality and content of the constitutional amendments was discussed.

The next discussion was the scope of judicial review in regard to constitutional amendments with reference to the doctrines of *stare decisis* and prospective over-ruling.

Lastly, this morning we discussed the question of the remedies that we can suggest. I will take it for granted that amendment of fundamental rights might be a necessity and has to be undertaken. I also take it as a fact that *Golak Nath's* case is there. Assuming these two things, we have to find some solution to the question.

On the one hand, there has been a school of thought which believes in masterly inactivity. They think that we should not take any steps at present and keep quiet and the Supreme Court will change its decision

in due course. There is good deal of force in that. But it is perhaps not quite easy to wait for a long time. It is perhaps necessary to take some active steps in regard to this matter.

You have heard the rapporteurs just now. The various suggestions which have been made and the active steps that we might take, either with regard to the convening of a constituent assembly or with regard to a referendum or referring the matter to the Supreme Court for its advisory opinion. All these matters have been considered.

I would put only one suggestion: we should undertake some amendment of the Constitution, even for a strategic purpose to bring the matter before the Supreme Court. I am glad that Mr. Nath Pai is here. He has introduced a bill which has been referred to a Joint Committee. With the objects of the bill, I agree but with the *modus operandi* I have doubts whether this bill would serve the necessary purpose. Because in the first place, it appears to me, it looks like a unilateral declaration by Parliament that it has the power to amend fundamental rights. That might bring Parliament into direct conflict with the Supreme Court, and that is a thing which we should try to avoid, if we can. The same object perhaps can be achieved in a better way by amending article 368.

My suggestions are that article 368 should be amended with two objectives in view. In the first place some restrictions should be put on the power of Parliament in making amendments to fundamental rights. In other words, we should make a provision that in order that fundamental rights might be amended, ratification by the States would be necessary. If we amend the proviso to article 368 by putting Part III therein, then, having regard to the composition of the present Parliament and the various State legislatures, it would not be an easy task to bring about any amendment of fundamental rights unless the whole country wants it. Therefore, this will be a sufficient safeguard. But that by itself will not solve the problem created by *Golak Nath's* case.

For that particular purpose, I shall first make a suggestion that there should be a clear provision in article 368 that when Parliament is exercising powers under article 368, it should function as a constituent body and not in its ordinary law-making capacity. What I want to say is this: that the basis of *Golak Nath's* judgment is that Parliament amends the Constitution in exercise of its legislative powers, therefore, it is hit by article 13(2); and a suggestion has been thrown out that if there is a constituent assembly, this difficulty will not arise. Therefore, following the suggestion of the Supreme Court, I would say that this provision might also be inserted in article 368. I am not going to say that this is fool proof, but this might help in toning down the conflict between the Supreme Court

It was, however, pointed out that all these suggestions would amount to asking the Supreme Court to consider a decision within less than a year of its making the pronouncement and it was very unlikely that the Supreme Court will change its opinion so soon.

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was brought out by some speakers including myself. So far as it is a point of view it could be included.

**Another member:** What the reports have conveyed is that there was a consensus on the fact that the constituent assembly can be convoked; that there was no consensus or support to the fact that the Constitution could be amended by *referendum*. Then the only thing remains, and my view is, that the majority of the members who spoke were of the view that the right to amend the Constitution vested in Parliament and Parliament should exercise it. I think this is a positive aspect of today's debate which should be brought into it and not only the negative aspect.

**S. K. Das:** If there are no more comments, I think it might be advisable and profitable to us if Mr. Nath Pai makes remarks now as he was not able to come earlier due to unavoidable reasons. So with your permission, I call upon Mr. Nath Pai to make his remarks on the subject of this Convention.

**Nath Pai:** I have been a loser by not being able to come here earlier to take part in the deliberations, but I have one consolation that perhaps, unwittingly, unconsciously, and without complaining I might have contributed by being absent. Those who disagreed with me might have been able to offer their criticism without feeling any inhibition or restraint, which would have operated in their mind had I been present here. I will say only one thing about my effort, in introducing the Amendment Bill. In the lucid summary, which was given in the comments, I could get the essence of what transpired at the learned discussions that took place here.

In the first place my humble submission has been to the Lok Sabha and to those who have cared to listen to me, that I am not audacious, impertinent, arrogant or rude enough to seek to amend the Constitution. The Supreme Court has tried to amend the Constitution and I am trying to reconstitute the Constitution as it was given to us by those who framed it. By the judgment of February 27, 1967, the Constitution was unilaterally changed by one of the co-ordinating organs of the State of India, the Supreme Court, whose functions are well defined in the Constitution. My submission is that Parliament is supreme in the field of legislation and the Supreme Court is supreme in the field of interpretation.

Then there is the question of a misconception of sovereignty. I have not claimed sovereignty for Parliament. Sovereignty is vested in the people of India. Parliament exercises it *on behalf of the people of India*. Since the times have changed, no democracy has directly exercised

and Parliament. I suggest, therefore, that article 368 should be amended on the basis suggested by me so that the causes of conflict may not arise between the Legislature and Judiciary.

### Comments on the Reports From the Floor

**A member** This is a comment on Professor T. K. Tope's report on the opening day of the session. Mr. Setalvad in his speech had made a point which to my mind is an important point. It is about the judgment of the Supreme Court. He said that the Supreme Court through the majority judges while holding under article 13(2) that Parliament cannot amend the Constitution for the purpose of taking away or abridging the fundamental rights gave the judgment prospective operation saving first, fourth and seventeenth amendments from being rendered unconstitutional. By giving the judgment prospective operation, they have in fact legislated, because according to him, article 13(2) has not laid down that the Supreme Court may declare an Act prospectively void. So it is beyond the scope of article 13(2). In that way the judges have legislated.

**Another member:** I should think, Mr. Chairman, that the reports are fairly all right. But taking an impersonal view, I may say that certain points were not brought out therein. In Professor V. K. N. Menon's report, so many points have been covered. One more probably might get itself attracted and that is the content of fundamental rights as a sort of protection to the minorities, as a guarantee, can be worked out, and the rights can still be brought to the restrictive clauses.

There was one more suggestion that a better drafting could easily avoid an amendment of the Constitution and bring it within the operations of the restrictive clauses. This might probably be included in the report.

Then in respect of Dr. C. B. Agarwala's report, the only thing I wanted to mention was that he stated that there was a consensus that the fundamental rights are amendable. I do not know whether it could be said. Although there was a fair number of persons who were advocating that view, I would not call it a consensus because opinion thereon was divided.

Then as regards Professor P. K. Tripathi's report, all that I have to say is, it has been fairly long, but it might have included the point that was raised that a constituent assembly can be convoked under the powers vested under article 248 of the Constitution. The matter was mentioned and a suggested referendum by an addition of article 368(A)

Finally, people are worried that if Parliament is given this power, the sovereignty, Parliament may negative the fundamental rights. They say that a wrong type of majority may come and curtail the rights and, therefore, a referendum should be held in this regard. I think history is being colossally neglected. This is not the forum to talk politically or from a historical perspective. Once you have got such a kind of atmosphere in the country, which makes possible the advent of a totalitarian regime, then a Constitution does not give the rights at all. We know that in totalitarian countries also referendums are held. Once having seen that the basic sanction of democracy, the will of the people, was destroyed, then Hitler could get a 97 per cent votes in a referendum and in some other countries, 99 per cent votes have been got in referendums. I submit, he who wants to have liberty must put his trust in democracy. There is no democracy without liberty and no liberty without an infinite faith in the people. This habit of people treating people that we know better is a dangerous one and I do not subscribe to it.

Before I conclude, I would quote here another great man, Jefferson who, I think, perhaps, will be shining before generations of democrats as a model. What has he to say on this subject which touches upon my submission that sovereignty of the country is vested in our people, in the parliamentarians that we are. Ours is a transitory law. We are to exercise it as trustees on their behalf. Governments are republican only in proportion they embody the will of people. It is an axiom in my mind that our liberty can never be safe but in the hands of the people themselves. I know of no safe depository of the ultimate powers of society but the people themselves.

In my humble effort, I have tried to see that this liberty, this sovereignty, which belongs to the people of India, which is being taken away under the garb of interpretations, is restituted to them. I do not want the Supreme Court to become third legislative chamber, as somebody said; and I would not suggest an amendment of the Constitution requiring a two-third majority of the Supreme Court in adjudicating constitutional issues. I would not try to amend the Constitution for this purpose. I would continue to submit myself. People ask me, what would happen if your amendment is struck down by the Supreme Court. I will bow down to that authority. I am not guilty of what I am being accused of, wanting to interfere with the independence of the judiciary. If my proposed amendment to the Constitution is struck down, I will find another way, but always within this framework that the functions of interpretation is that of the judiciary and to legislate is mine as a member of Parliament. I hope this is what we are trying to do and this, perhaps, will be seen in the perspective whether the effort succeeds or not.



that sovereignty. It was only in the times of Athens that sovereignty was directly exercised by the people. But since that time the sovereignty has been exercised on behalf of the people by Parliament. That sovereignty today has been curtailed. It is not the right of Parliament which *Golak Nath's* case tries to take away. My submission—with my unimpeachable and unique respect for the authority and the independence and the status of the Supreme Court—is that the Supreme Court had gone beyond its field of legitimate interpretation and assumed to itself the role which is not its legitimate role, that of making the Constitution. The basis of my submission is that the Supreme Court tells us that the previous two cases were wrongly decided by it and by a narrow majority of one, wants us to understand that somehow the new judgment is invested with infallibility. I am afraid I do not concede this role to the Supreme Court, I do not subscribe to the doctrine which is not adumbrated so clearly, but which is implicit in the judgment, the doctrine of judicial infallibility, and the doctrine of sovereignty.

Here, so far as the Supreme Court should not try to legislate, may I humbly quote a great pragmatic thinker, respected in the world of law, Francis Bacon, who in his '*De Augmentis*' had this to say:

When a judge transgresses the letter of the law he takes upon himself the function which is not his. He tries to become the law maker.

In our time, Brandeis has put it thus:

An exercise of the powers of a super-legislature is not the performance of the constitutional functions of judicial review.

This is all that I have to submit regarding the legitimate function of the Supreme Court. The second thing is about judicial infallibility. Here again I would not like to impose my views on you, but would quote what some one else has said:

Human judgment is fallacious. And I think, great as the judges are, I may humbly submit that their judgments are likely to be fallible too.

Now I will turn to the most important question, the question of the sovereignty of the people of India. It was one of the great judges, and, therefore, a luminary of all of us, Justice Holmes of the Supreme Court of the United States, who said that a Constitution is not what the judges will say it is but basically what the people want it to be. I subscribe to this view.

During the discussion a distinction has been drawn between the law binding on all other courts in India and the law of the land. The distinction, if I may put it pithily, is this: the law of the land will bind even the Supreme Court, but the law which the Supreme Court declares will bind other courts and does not bind the Supreme Court for the simple reason that in another article the Constitution says that the Supreme Court may review its own judgment. So we must start from the position that even though the majority is a slender majority of one, the interpretation which the Supreme Court has put on the relevant articles of the Constitution relating to the taking away or abridgement of fundamental rights in Part III of the Constitution is the law declared by the Supreme Court and it holds the field unless the decision is reconsidered by the Supreme Court, or we find other means of taking away the effect of that decision.

The first question which has been discussed is the quality and content of fundamental rights, and you have heard from the rapporteurs a summary of that discussion. Without going into minor details, one can say that there is a difference in basic approach with regard to that question. One approach is that these fundamental rights were reserved to the people, the sovereign people, and they cannot be tampered with by Parliament. *This theory of reservation of certain rights by the people* starts from the days of Rousseau, the days of the theory of Social Contract, and there has been a good deal of discussion of the theory since then. My own feeling is that very few people now believe in the theory that the State originated in a contract, in which people retained some rights and parted with others in favour of the State. Be that as it may, that is one view which has been expressed very forcefully by one of the participants of this Convention, if I remember aright, in the discussions which took place and he said that these rights have been reserved and it is not open to Parliament to deal with them in any way. Right or wrong that is one view expressed; and I think that Chief Justice Subba Rao in the majority judgment has said that this reservation is expressed by article 13(2) of the Constitution.

The other view is that fundamental rights like other constitutional rights are capable of amendment, and article 13(2) merely draws attention to the distinction between the exercise of constituent power and the exercise of legislative power; and in a Welfare State even fundamental rights may undergo change, particularly when they embrace a large number of rights all of which do not bear the same character.

These are the two competing views and in-between these competing views, there are numerous ramifications about which also there has been some difference of opinion.

**S. K. Das :** My first duty, and a very pleasant one, is to thank the sponsors of this Convention for the signal public service that they have done. I thank them particularly for three things. Firstly, they have focussed attention of the public to the problem which has arisen by reason of the decision of the Supreme Court and the questions involved in that problem. Secondly, they have so arranged it that a widespread spectrum of views be reflected on the questions involved. Thirdly, they have arranged for a discussion of the various solutions suggested for solving the problem.

I have no doubt in my mind that the comments and the views expressed by the participants and by the members of the presidium panel when gathered together, will be a very useful guide for the crystallisation of public opinion on this very important constitutional question, a question which really involved the nation as a whole. I venture to think that it will be useful also to members of the profession who, day in and day out, have to wrestle with these problems, and I not only venture, but hope that the discussion which has taken place during the three days of this Convention, will be helpful to those who have the difficult privilege of pronouncing on the laws of the land. I take it that those of you who are present here, agree with these views. The reports of the rapporteurs when they are edited, will, I understand, be circulated to the proper quarters, including the Joint Committee of Parliament which will be considering Mr. Nath Pai's Bill and I hope that the members of the Joint Committee will find the discussion in this Convention useful.

I thank the participants and I also thank those who did not participate but listened to the views expressed during the discussion.

Before I proceed to make further observations, I would like to refer the last speaker (Mr. Nath Pai) with regard to some of his observations. Mr. Nath Pai has very rightly said that judges are not infallible. I would only add a rider that Parliamentarians are also not infallible. It may not be necessary to go as far back as Francis Bacon to make the point that judges must work within the limited sphere given to them by the Constitution. It is indeed true that all men may err, and I am glad to note Mr. Nath Pai has such implicit faith in the people and it is a right thing for a democrat to have that faith. It is well to remember, however, that the people in whom he has such faith gave unto themselves a Constitution in which they said that there must be a body to interpret the Constitution and that body happens to be the Supreme Court of India. And the people further said in article 141 that a law declared by the Supreme Court will be the law binding on all courts in India.

a misconception. A lot has been said about a reference to the Supreme Court under article 143 of the Constitution. Now, if you see article 143 of the Constitution, you will see that the President can make a reference when there is a dispute about a question of fact or a question of law, or a dispute about a question of fact or a question of law is likely to arise. You cannot make a reference to the Supreme Court, as was suggested by one of the participants, saying "please tell us how to restore the authority to Parliament, an authority which we all assumed lay in Parliament." If such a reference were made to the Supreme Court, the Supreme Court will no doubt refuse to give its opinion. This was pointed out during the discussion.

Similarly, there was a suggestion that we might make a reference under article 143 of the Constitution asking the Supreme Court to reconsider the decision in *Golak Nath's* case. That again is not permissible. The Supreme Court, in its advisory jurisdiction, cannot over-rule a decision given in a case by the full Court. When I made a reference to article 143 of the Constitution, I made a reference in a completely different context. I said that there was a suggestion made by some of the judges in *Golak Nath's* case that Parliament can under article 248 read with residuary item 97 of List I call a constituent body and that constituent body can then change the Constitution. I pointed out, and it was pointed out by several speakers during the discussion, that this suggestion was made by some of the judges on only a tentative basis. On this suggestion, if it is to be worked out, if it is to be followed, we must have first a clear opinion of the Supreme Court on a reference made under article 143 whether this suggestion can be acted upon without legal impediments. There may be several legal impediments. I need not repeat them. Some have pointed out how can a constituted body create a constituent body; how can a non-sovereign body create a sovereign body; and the constituent body can change the entire constitution if it so likes.

Then there is another very important point which I do not think figured in the discussion. Article 248 says, you can legislate under the residuary item in respect of a matter in which you have exclusive jurisdiction. The word "exclusive" occurs in article 248. If you go to article 368 you will see that in the matter of amendment, some part of it, the part referred to by the proviso, is not the exclusive jurisdiction of Parliament. You have to bring in one-half of the State legislatures. So these are the difficulties of Parliament creating a constituent body and then asking the constituent body whether the fundamental rights can be changed or not. This suggestion bristles with so many legal difficulties that unless those legal difficulties are cleared by an opinion of the Supreme Court, this suggestion should not be acted upon.

I do not take it that the intention of this Convention was to reach a unanimous decision or even a majority decision on any one of the points discussed. The Convention was intended to focus attention on all these problems, and allow people to express their views freely. So, perhaps there was no consensus. I am saying this open to correction. Perhaps, there was no consensus in the sense of unanimity, or near unanimity on any of the questions discussed. But still a very useful purpose has been served by allowing people to express views on these questions, so that those on whom will fall the responsibility of initiating the steps, if any steps be necessary, to solve the problem, will get necessary help from the publication of the views which have been expressed in this Convention.

I take it, Dr. Singhvi, that that was the main purpose of this Convention. So it is not necessary for us to emphasize unanimity or near unanimity, and if any of the rapporteurs have said that there was a consensus on any particular point, perhaps they will consider whether the word "consensus" is really appropriate. Perhaps if there was a consensus in the sense of near unanimity it was on the question of judicial review, meaning thereby only that the Supreme Court has the right of judicial review, but that right should not be so interpreted as to make the Supreme Court the sovereign authority to amend the Constitution itself. This is an aspect, which Mr. Nath Pai has pointed out. So far I remember it was one of the dissenting judgments of Justice Brandeis in which he said that to exercise such a power would be to arrogate to itself the power of a super-legislature. That, I think, is a legitimate criticism, and speaking for myself this doctrine of prospective overruling which the Supreme Court has accepted and adopted for this country really amounts to this. It would really mean that they are incorporating another proviso to sub-clause (2) of article 13, and that proviso is to the effect that "Notwithstanding anything contained in sub-clause (2), the law so enacted shall not be void except for the future, if the majority of the Supreme Court so decides." This, I think is a criticism of substance. It really amounts to legislation or amendment of the Constitution.

I once had the privilege of being a member of the Supreme Court and all my life has been devoted to the administration of justice and I should be the last person to be disrespectful to the Supreme Court. But I do submit that justice is not a cloistered virtue, and if a judgment appears wrong in principle, on a question which so vitally affects the nation, there is nothing disrespectful in expressing a different view. This is not derogatory of the Supreme Court.

I will make a few observations on some of the other points which have been discussed during the Convention. Here I should like to remove

hesitation in rending the veil as it were, on your amendments and finding out what in substance those amendments are. If in substance those amendments are that rights which have been reserved to the people, and which cannot be dealt with by Parliament, if that view stands, then however ingenious the amendments may be—and your ingenuity can go very far indeed—the Supreme Court will strike down the amendments unless—and this is a very big ‘unless’—the Supreme Court goes back on its earlier decision. In other words, the crux of the whole matter is a reconsideration of *Galal Nath's* case.

One suggestion made was—and this I think is an important suggestion—to so amend article 368 as to try to win over some of the hesitant people who do not like to tamper lightly with these fundamental rights. And how to win over—I am using a very innocent word—the hesitant? Can we win over these people by putting in an amendment which would show that the fundamental rights are also in the entrenched portion of article 368? Mr. Nath Pai has not done that. His Bill does not do that.

Now, one of the participants, I think, raised some anomalies with regard to the amendment of article 368. The whole of the amendments have been dealt with in a very recent book on “Constitutional Law of India” by the Advocate General of Maharashtra, Mr. H. M. Seervai. It is a recent book published about a month ago. Four of the anomalies referred to have been dealt with there. But I have no time to go into that.

All that I say is that if you make fundamental rights entrenched in the Constitution in the sense that you cannot lightly tamper with them, that means you can only tamper with them if there is a two-thirds majority of each house of Parliament, and one-half of the State legislatures. The political scene today at the Centre, as also in the States, is such—I am not a politician, I have no insight into politics, and Mr. Nath Pai and other Parliamentarians present here will excuse me, if I am saying something which is politically not correct—that unless you can carry with you two-thirds majority in Parliament and one half of the States as required by the proviso to article 368 you cannot even amend article 368. One of the aims should be to make the amendment in such a way that it carries the goodwill and support of a large majority of the representatives of the people in Parliament as well as in the State legislatures. So this is a matter which is well worth considering.

One suggestion made was to take away the requirement of assent of the President from article 368. Speaking for myself I should not like to leave out the President from such an important piece of legislation. I am calling it legislation, even though it is a constitutional amendment. I

Having removed this misconception, I now rapidly proceed to make my observations on some of the remedies suggested.

The suggestion of referendum, in my personal opinion, is not practicable because first of all we have to make a law under residuary item 97. If a referendum is made thereunder, the answer may be, 'yes, fundamental rights can be amended.' But then you have to have somebody to make a law incorporating the result of that referendum. And as soon as Parliament makes the law the same difficulty would arise. I think this was also pointed out by one of the participants in the discussion.

**L. M. Singhvi:** Mr. Govinda Menon.

**S. K. Das:** I think Mr. Gae also mentioned this, perhaps.

Now referendum and constituent body, if these two go, there remain only three suggestions:

One is wait for a suitable occasion when the Supreme Court, itself reconsiders *Golak Nath's* decision. I think one of the commentators today has characterized this as 'masterly inactivity'; I do not know whether it is masterly or not but the trouble is that the identical question must arise in another case before the Supreme Court would reconsider it. The Supreme Court will not go out of its way to reconsider the decision unless an identical question arises in another case. Whether such a case is pending now in the Supreme Court or not, I have no knowledge.

Another suggestion is : why not file an application for review to the Supreme Court to ask it to reconsider its decision. Now, you know that applications for review are dealt with a certain amount, or shall I say, a great deal of hesitation and caution. And a mere application for review, when a decision has been given by the full court, may not serve any practical purpose.

Then the third suggestion is to amend article 368 or other articles if necessary and as soon as those amendments are made, the matter will be taken to the Supreme Court undoubtedly by one or other of the parties and then the Supreme Court will have an opportunity of reconsidering its decision. In this case the shape of the amendment is a very important question and as to this various suggestions have been made. I think one of the participants gave a detailed consideration to this point and suggested various amendments. But briefly, I think the Minister for Law, Mr. Govinda Menon, also suggested an amendment in two parts.

Now, gentlemen, however ingenious you may be in drafting the amendments, please remember that the Supreme Court will have no

repealed but had not been used for some time and also got powers from the Congress to introduce certain legislation which would remedy this kind of affairs and that legislation was known as the New Deal Legislation. Between 1934 and 1936 the U. S. Supreme Court invalidated a large part of that legislation. There was a great hulla-balloo about it. Then President Roosevelt was re-elected in 1936 and he carried with him all the States except two States. And then he sent a State of the Union Message to Congress and suggested to the Congress a reorganisation of the judicial organ of the Federal Government. It was his suggestion that for each judge who had attained the age of 70, he would appoint an additional judge and he wanted the Congress to give him the necessary powers to appoint an additional judge. This was what he did. The Supreme Court had then heard a case in conference. It was known as the *Parrish* case. In March 1937 the *Parrish* case was decided upholding minimum wage legislation by 5 to 4. The Wagner Labour Relations Act was decided later on by 5 to 4. The Social Security Act was decided by 5 to 4, again by a single majority. And in June 1937 one of the judges retired and President Roosevelt appointed another judge in his place. Thereafter the Congress rejected the President's plan of the reorganization of the judiciary of the Federal Government. Then, by that time, the battle had been won and American writers who have dealt with the American Constitution have said that President Roosevelt lost the battle but won the war.

*That is a situation which, I say with all the earnestness I command, should not be created in this country. We should not create a conflict of that kind in our country; and, if possible, we should work in harmony.*

And this is one of the aspects which I think Jawaharlal Nehru had in mind when he made a very noteworthy speech. He said, when a constitutional deadlock appears, what should we do? And this is what he said. *One is the method of change in the Constitution.* The other is what we have seen in great countries across the seas, that the executive which is the appointing authority of the judiciary begins to appoint judges of its own liking for getting decisions in its favour. He used very mild language, and said, "It is not a very good method". I humbly say that we should not create this kind of tension and conflict, if we can avoid it.

I have made my observations on the remedies suggested and I conclude by making an appeal. I am making this appeal particularly as Mr. Nath Pai is here: Can we take this question out of party politics? *Is this not a national question? Cannot it be solved in a national way? Cannot there be an all-parties conference where this matter can be dis-*



think the idea of leaving out the President was to bring out the distinction between the exercise of power of ordinary legislation and the constituent power. But once you give that power under article 368 to amend, and once you entrench the fundamental rights, the constituent power is there. Why take away the President from the process of constitutional amendment? It would not look well and it would create a very bad precedent.

We must also remember that to create a conflict between Parliament and the Supreme Court will not be good for the nation. It has been stated by judges of the Supreme Court, that each organ of the State must do its duty in its own sphere and there is no question of infallibility, there is no question of any contest, there is no question of any opposition to one another too. That is a very salutary point of view which must be kept in mind.

I now go back to another suggestion about the enlargement of the Supreme Court. I think the suggestion was made to enlarge the number of the Bench of the Supreme Court, and also to make decisions on constitutional questions either unanimously or by two-thirds majority.

Now I take up the second point first. If you by law say in the Constitution that a decision on a constitutional question must be unanimous, or by a two-thirds majority, what happens when the judges are not unanimous? Will no decision be given? Suppose there are nine judges. Two-thirds majority will meet at 6 to 3. Suppose the decision is taken by 5 to 4. What will happen? How will the decision be given? So these things will have to be worked out a little more carefully and we must make a distinction between permanently enlarging the Supreme Court and getting *ad hoc* judges for constitutional cases. I made a suggestion that when a certificate is given by the Attorney General that in cases of grave constitutional importance, whether we could have some *ad hoc* judges. But it will require a change of article 127, I think. These are the suggestions which require a little more careful consideration than we were able to give within the three days before us.

I now have more or less finished except about enlarging the number of the judges. This brings to my mind what happened in America about the New Deal judges. Actually what happened was this. I just state the facts and the circumstances that were present in America. I think some time in March 1933, Roosevelt was inaugurated President. On the day before he was inaugurated as President, I think in 28 States banks had suspended their operations, or had restricted their operations and there were no banking transactions, and as one American author has said, "gold disappeared like water in sand and all business came to a standstill". President Roosevelt resorted to some laws which had not been

for the voluminous documentation which they produced and which has been a source of great help to us in our deliberations.

Thanks have been expressed already on my behalf by Dr. Agarwala to the India International Centre. It is just as well, because we thought we should be privileged to cooperate with the Institute of Constitutional and Parliamentary Studies as well as the other bodies in organizing this all India Convention in a matter of very great importance in this country.

When I spoke to Dr. Singhvi about four or five months ago, I think probably some time in April, I told him that we should be prepared fully to cooperate with his institution. As a matter of fact we were ourselves planning a seminar of this type. But it was just as well that, in a matter like this, central leading Associations of Delhi had agreed to cooperate. For such bodies as you know, were the co-sponsors of the Seminar. It is our regret that Mr. Purshottam Trikumdas, on behalf of the Commission of Jurists which he represents, could not be present and participate in the discussion on account of his illness. We had with us the representatives from the other Associations and we are very happy that they have not only participated in the preliminary arrangements but took an active interest in the discussion.

I need hardly thank the gentlemen of the Press. They have been, I think on the whole fairly reasonable and good friends. I am glad that they are also here tonight, because the dissemination of the discussion at the concluding session will go far to bring the main conclusion of the Seminar to the notice of the wider public.

May I add that the object of the Convention was not to arrive at unanimity or even at any consensus. The search for consensus was not a game in which we wished to indulge. That sort of consensus-hunting goes on elsewhere, particularly in the political fields. But here in forums like this we only endeavour to offer opportunities to people of different views to get together and to engage in constructive intellectual encounters. From that point of view, I hope all of you will agree that this Convention has been worthwhile. We were not here to present the people of this country or even a particular body, even Parliament or, indeed, anybody else, with a set of agreed conclusions, or even a set of conclusions on which a majority have taken a view against a minority. It would be wrong for bodies like our, and indeed in all intellectual forums such as I should like to see built up not only at this Centre but also elsewhere, to attempt to do that. Anyhow, that has been the policy in this Centre for the last few years since I have been in charge of, and I hope that policy is maintained even when I am not here. If unanimity results from our

cussed and a way found how to solve the problem? A distinction should be drawn between the general power of amending, and amending a fundamental right when necessary. There are certain basic rights which should not really be tampered with except in the case of extreme urgency. There are such rights which ought not to be tampered with. I appeal that this is a matter which vitally affects everybody, it is the Constitution under which we live, it is the Constitution under which we grow, it is the Constitution which embodies our future aspirations, our future hopes. This question should be raised above party politics, should be treated as a national problem and dealt with in a national way. This is my appeal. A society grows, as Prof. Toynbee has pointed out, by challenge and response. This is a challenge. A challenge presents ordeals and you go through these ordeals and the way you meet these ordeals is the measure of your greatness, is the measure of your manliness, is the measure of the nation's might and strength.

I appeal, as the spokesman—Dr. Singhvi told me I should speak as the spokesmen of the Convention—to the nationhood of this great nation, to the people of this great nation, that please treat this question as a national question and solve it in a national way.

**D. L. Mazumdar:** I am afraid that our planning for this concluding session has gone somewhat away. We had hoped that it would be a short session. In the event it has been a pretty long one, as long as half of one of our regular sessions for the last two days. But I am sure most of you who were not present in these early sessions and did not take part in the discussions, are glad that it has been so, because in the rapporteurs' reports to this final session, as well as in the long speech of the Chairman, you have a conspectus of the discussions that took place. You may not have, therefore, missed very much, if you did not actually attend the Convention. I think that has been an unforeseen advantage of this somewhat legally concluding session.

Having said this, all that remains for me to say here, at the behest of Dr. Singhvi and my colleagues on the Steering Committee, is to convey on your behalf and on behalf of the organisers of this Convention, our very grateful thanks to all the participants who took the trouble of coming over and taking part in this Convention, particularly to those who came from outside Delhi. It was not easy to come here at short notice—it is never easy to get away from one's normal business at short notice—and we are, indeed, very grateful to them that they could make it convenient to spend some time with us. I am sure that all of you, as well as the sponsoring bodies would like to convey our thanks to the Institute of Constitutional and Parliamentary Studies for the spade work that they did for the Convention, and in particular to the session staff of that body

for the voluminous documentation which they produced and which has been a source of great help to us in our deliberations.

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When I spoke to Dr. Singhvi about four or five months ago, I think probably some time in April, I told him that we should be prepared fully to cooperate with his institution. As a matter of fact we were ourselves planning a seminar of this type. But it was just as well that, in a matter like this, central leading Associations of Delhi had agreed to cooperate. For such bodies as you know, were the co-sponsors of the Seminar. It is our regret that Mr. Purshottam Trikumdas, on behalf of the Commission of Jurists which he represents, could not be present and participate in the discussion on account of his illness. We had with us the representatives from the other Associations and we are very happy that they have not only participated in the preliminary arrangements but took an active interest in the discussion.

I need hardly thank the gentlemen of the Press. They have been, I think on the whole fairly reasonable and good friends. I am glad that they are also here tonight, because the dissemination of the discussion at the concluding session will go far to bring the main conclusion of the Seminar to the notice of the wider public.

May I add that the object of the Convention was not to arrive at unanimity or even at any consensus. The search for consensus was not a game in which we wished to indulge. That sort of consensus-hunting goes on elsewhere, particularly in the political fields. But here in forums like this we only endeavour to offer opportunities to people of different views to get together and to engage in constructive intellectual encounters. From that point of view, I hope all of you will agree that this Convention has been worthwhile. We were not here to present the people of this country or even a particular body, even Parliament or, indeed, anybody else, with a set of agreed conclusions, or even a set of conclusions on which a majority have taken a view against a minority. It would be wrong for bodies like our, and indeed in all intellectual forums such as I should like to see built up not only at this Centre but also elsewhere, to attempt to do that. Anyhow, that has been the policy in this Centre for the last few years since I have been in charge of, and I hope that policy is maintained even when I am not here. If unanimity results from our

cussed and a way found how to solve the problem? A distinction should be drawn between the general power of amending, and amending a fundamental right when necessary. There are certain basic rights which should not really be tampered with except in the case of extreme urgency. There are such rights which ought not to be tampered with. I appeal that this is a matter which vitally affects everybody, it is the Constitution under which we live, it is the Constitution under which we grow, it is the Constitution which embodies our future aspirations, our future hopes. This question should be raised above party politics, should be treated as a national problem and dealt with in a national way. This is my appeal. A society grows, as Prof. Toynbee has pointed out, by challenge and response. This is a challenge. A challenge presents ordeals and you go through these ordeals and the way you meet these ordeals is the measure of your greatness, is the measure of your manliness, is the measure of the nation's might and strength.

I appeal, as the spokesman—Dr. Singhvi told me I should speak as the spokesmen of the Convention—to the nationhood of this great nation, to the people of this great nation, that please treat this question as a national question and solve it in a national way.

**D. L. Mazumdar:** I am afraid that our planning for this concluding session has gone somewhat away. We had hoped that it would be a short session. In the event it has been a pretty long one, as long as half of one of our regular sessions for the last two days. But I am sure most of you who were not present in these early sessions and did not take part in the discussions, are glad that it has been so, because in the rapporteurs' reports to this final session, as well as in the long speech of the Chairman, you have a conspectus of the discussions that took place. You may not have, therefore, missed very much, if you did not actually attend the Convention. I think that has been an unforeseen advantage of this somewhat legally concluding session.

Having said this, all that remains for me to say here, at the behest of Dr. Singhvi and my colleagues on the Steering Committee, is to convey on your behalf and on behalf of the organisers of this Convention, our very grateful thanks to all the participants who took the trouble of coming over and taking part in this Convention, particularly to those who came from outside Delhi. It was not easy to come here at short notice—it is never easy to get away from one's normal business at short notice—and we are, indeed, very grateful to them that they could make it convenient to spend some time with us. I am sure that all of you, as well as the sponsoring bodies would like to convey our thanks to the Institute of Constitutional and Parliamentary Studies for the spade work that they did for the Convention, and in particular to the session staff of that body

confabulations it is good. If this does not result, nothing is lost. It is for the others to profit by the trend of the discussions. Although there has been no unanimity in the ordinary sense of this word certain dominant thoughts were brought out and I am sure the people in authority who are concerned with these matters will take note of this dominance. In this expectation we can perhaps feel happy at the thought that this Convention has been abundantly worth while. Anyhow, I do hope and trust that it has been not a waste of time for those of you who came from a distance to participate in this Convention.

## APPENDIX I

### FREEDOMS IN FREE INDIA\*

K. Subba Rao

It may be said that while the Constitution enables the State to bring about all reasonable socio-economic reforms in an orderly way, it protects the fundamental freedoms of the people against both legislative and executive action.

But during the last 17 years, after the Constitution came into force, many of the freedoms were taken away or considerably abridged by executive action, judicial interpretation and legislative amendments. By executive action in the year 1962, a proclamation was issued declaring that a grave emergency existed whereby the security of India was threatened by external aggression. This was issued immediately after the Chinese attacked India. The conditions for issuing the proclamations were certainly in existence in the year 1962. But for one reason or the other, the proclamation was continued to be in force for more than 5 years.<sup>1</sup> Objectively looked at, it is not possible to say that there has been such an emergency as contemplated by article 352 to sustain the continuance of the proclamation all these 5 years, though during the Pakistani invasion, its existence was justifiable. The result of this continued state of emergency has brought about the following results,

People's freedoms under article 19 are suspended. Their rights to enforce their other freedoms may by a special order be suspended. The Union Executive can by directions interfere with the executive of the State. The Parliament by law can empower the Union Officers to deal with the matters not within the Union list. It could also modify the manner of distribution of revenues between the Union and the States. The result

\* Address delivered by K. Subba Rao, former Chief Justice, Supreme Court of India at the Nagpur University College of Law, on September 23, 1967 : AIR 1968 Journal 21. Extracts reproduced with the kind permission of All India Reporter, Nagpur.

1. The emergency has been lifted with effect from October 1, 1968.—*Ed.*

of compensation, the adequacy whereof is not justiciable. He has also no fundamental right to his property, if it is an estate as defined in the Constitution, for he can be deprived of it by law without compensation. So too the rights of managing agents and the rights under agreement for mining oils can be extinguished by law without compensation. All the laws included in the Ninth Schedule, though they affect the fundamental rights of the people, are validated. But all the laws except those hit by article 31A and article 31B shall stand the test of doctrine of equality and furthermore the freedoms are still maintained against executive action. Thus we have been deprived of our seven freedoms under article 19 since the last five years and I do not know for how many more years the said situation would continue. Practically, we have no right to life and personal liberty and property in a large area against legislative action, and in the system of parliamentary executive, without a strong united opposition and enlightened public opinion, the freedoms against executive action would not be of any practical importance as the executive, if it chooses, could push through any legislation through the Parliament or the State legislatures as the case may be.

The Constitution has provided two instruments of preservation of freedoms but paradoxically, the said two instruments have turned out to be instruments of destruction.

The first instrument of preservation of freedoms turned out to be one of destruction, is the provision for the proclamation of emergency under article 352 of the Constitution...

The second instrument of preservation of our constitutional democracy and our freedoms is the power to amend the Constitution. But the history of these 17 years discloses that the said power is used not to preserve the Constitution but to destroy it.

I have earlier pointed out how freedoms of our people have been abridged by the process of amendment. A constitution is made to be worked and not to be destroyed. The amending power is conferred on the Parliament to make the necessary adjustments for working the Constitution and not to destroy it for projecting the ideologies of a party in power which are inconsistent with that of the constitutional philosophy. The recent decision of the Supreme Court in *Golak Nath v. State of Punjab*<sup>7</sup> held that Parliament has no power to abridge or take away the fundamental rights by the amendment of the Constitution. It also maintained the validity of the amendments made upto the date of the judgment on the application of the doctrine of prospective overruling and one of the judges on the principle of acquiescence.



is that during the emergency if the Union Executive so chooses, it could convert federation into Unitary State and make the States practically administrative units under its supervision. Indeed the executive issued an order suspending the right to enforce the fundamental rights under articles 14, 21 and 22 in respect of orders made under Defence of India Act. It is, therefore, clear that all these 5 years the people of India have been under constitutional despotism and during the period, they have no rights under article 19 and they cannot enforce their rights under articles 14, 21 and 22 in respect of actions taken under the Defence of India Act.

We have also lost some of our freedoms by judicial interpretation. In *Gopalan's case*,<sup>2</sup> it was decided that a citizen will have no freedoms under article 19 if a legislature makes a law depriving him of his liberty. In *State Trading Corporation of India Ltd. v. Commercial Tax Officer*,<sup>3</sup> it was ruled by the Supreme Court that a corporation or a company was not a citizen within the meaning of article 19 and, therefore, it could not enforce the freedoms thereunder. In *Ujjambai's case*<sup>4</sup>, the Supreme Court held that even if a Tribunal wrongly decides that a citizen's right to do business was not infringed, the said citizen could not approach the Supreme Court for enforcing his fundamental rights, that is to say, the decision of a Tribunal acting within its jurisdiction in regard to a fundamental right is binding on the Supreme Court. In *Daryao's case*,<sup>5</sup> the Court held that if the High Court in exercise of its powers under article 226 of the Constitution decides on merits against the existence of fundamental rights, the said decision will be *res judicata* in a proceedings under article 32 of the Constitution. In *Sharma's case*,<sup>6</sup> the Court ruled that "the right of freedom of speech under article 19 shall yield to the privileges (as) of the legislature under article 194 of the Constitution".

The Supreme Court also evolved the doctrine of classification which is certainly necessary to give practical content to the freedom of equality, but the tendency to enlarge its scope if not checked in time, may lead to a situation when the fundamental right to equality may be replaced by the doctrine of classification.

Some of the freedoms of the people were also abridged or taken away by the amendments of the Constitution. A citizen has no freedom now to do business if a law is made conferring a monopoly on the State. He has also practically no right to property against legislative action as a law made can enable the State to acquire his property on payment

2. A.I.R 1950 S.C. 27.

3. A.I.R 1963 S.C. 1811.

4. A.I.R 1962 S.C. 1621.

5. A.I.R 1961 S.C. 1457.

6. A.I.R 1959 S.C. 395.

This judgment invited conflicting criticisms from jurists, advocates, politicians, statesmen and legislators. Some critics advanced constitutional and legal arguments in support of the rival contentions; some critics approached the problem from an ideological standpoint; others adopted a pragmatic approach to the problem. I shall try to answer briefly some typical attacks made on the validity of the judgment.

It is said that the Parliament is supreme and it can, therefore, amend every part of the Constitution. This assumption is wrong. Parliament is not supreme. Constitution is supreme. It has laid down a federal form of Government with Union and States exercising power in respect of the matters entrusted to them thereunder. It also provided for diffusion of power and for checks and counter-checks. It created three instrumentalities of power, legislature, executive and judiciary and it demarcated their respective powers and responsibilities. The legislature makes laws, the executive administers and the judiciary decides disputes between the Union and State, between State and citizens and between citizens. In this setup, it is not possible to say that the Parliament is supreme, though it may be said that it is sovereign within the field allotted to it subject to the checks imposed thereon. The Parliament, therefore, just like all other institutions created by the Constitution, must function under it and it cannot overstep the limits laid down therein. If this is borne in mind, it will immediately be evident that it is not possible to equate our Parliament with that of the British Parliament. The British Parliament is supreme; it has no written Constitution in the sense that India has one; it has a unitary form of Government. It can make or unmake any laws. This absolute doctrine was summed up by De Lome in the oft quoted aphorism, "that Parliament can do anything except make a man a woman, or a woman a man." But though the Parliament of England in theory can trample on the liberties of the people, the English Liberal tradition grounded in common law and the existence of two well-knit strong parties are an effective check on such a tendency. An eminent English judge recently said that if any party in power dared to attempt to deprive the people of their liberties, its fate was doomed at the next General Elections. The public opinion is so powerful in that country that no formal document preserving the rights of the people was found necessary. Therefore, the emotional appeal crystallized in the slogan, that in India the Parliament can do whatever it likes, has no foundation in fact and is contrary to the principles of constitutional democracy with its diffusion of power.

The said decision introduced a conflict between the judiciary and the Parliament. This comment again is based upon a misapprehension. There cannot possibly be any conflict between a court and the parties

that appear before it whether the parties happened to be private citizens or States. The conflict is really between the people of India and Parliament. When Parliament seeks to interfere with the fundamental rights of the people, a citizen of the country raises a dispute before a Court and makes the State a party and the court decides upon it. In the said decision, the Court decided the point in favour of the people and protected their rights. Supposing the Court held that Parliament could without any restriction take away or abridge the people's freedoms by amendment, can it be said there is a conflict between the Court and the people? In either case, the court will discharge the duty, though a delicate one, cast upon it under the Constitution and it decides the rights *inter se* to the best of its lights. A defeated party may criticise the judgment but it shall not be in the interest of the smooth administration of our country to place the court in the position of an adversary to the defeated party.

The main criticism is that article 368 confers the power to amend the Constitution and the 5 judges went wrong in finding that in articles 245, 246 and 248 of the Constitution. Particularly it is said that amending power cannot be a residuary power. The location of the power either in article 368 or in articles 245, 246 and 248 will not make any difference in the result. Whether the power is here or there, the main question is whether amendment is law. Irrespective of the source of the power, all the 6 judges in the majority held that the amendment is law. If it is law, it will be void under article 13(2) if it takes away or infringes fundamental right.

Amendment is made in exercise of a constituent power and thereafter amendment is not law within the meaning of article 13(2). This criticism involves sophistry. It is conceded on all hands that constitutional law is law. The law will not cease to be law because it is derived from one source rather than from another. The real distinction, therefore, is whether the amendment is made in exercise of the power under the Constitution or in the exercise of some power outside the Constitution. It cannot be disputed that the amendment is made in exercise of a power conferred under the Constitution either by article 368 or articles 245, 246 and 248. By describing the power under article 368 as constituent power, the amendment made does not cease to be one made in exercise of the power under the Constitution. However you may describe the power, the law of amendment is made in exercise of the power under the Constitution. If so looked at, the nomenclature given to the power has no relevance to the enquiry.

That apart, let me analyse this concept of constituent power. "The Constituent Power" is the power to elect representatives charged with the

making or changing a Constitution. This power rests with the people. They can elect a constituent assembly and confer the power on them. The constituent assembly after making a Constitution becomes *functus officio*. The said Assembly cannot confer that constituent power on any of the institutions created under the Constitution. It may confer a wide power of amendment on one of the institutions but that power of amendment is exercised under the Constitution, and, therefore, is not a constituent power. If the Parliament seeks to change the Constitution otherwise than by law of amendment, it can only seek the help of the people to create a new constituent assembly. This the Parliament can do in the exercise of residuary power.

It is also said that the present Parliament is more representative than the Constituent Assembly. If this statement means that the present Parliament is elected by adult franchise whereas the Constituent Assembly was brought into existence by indirect election, it is true. But it is not the counting of heads that matters but the quality of the power that is conferred on a particular Assembly. The people did not elect the Parliament as a Constituent Assembly to change the Constitution. In other words, they did not confer the constituent power on the Parliament.

There is also a suggestion that though the Supreme Court held that the Parliament cannot take away or abridge the fundamental rights by amendment, the Parliament can amend article 368 so as to confer such a power of amendment on the Parliament. There is an underlying fallacy in this suggestion. The amending power, as I said earlier, is found either in article 368 or in articles 245, 246, and 248 of the Constitution. Amendment made in exercise of that power is law. If the Parliament amends article 368, that amendment will be law. If that law empowers the Parliament to take away or abridge the fundamental rights, it will equally offend article 13(2) and, therefore, it will be void.

If any amendment is made by the Parliament either directly or indirectly taking away or abridging the fundamental rights, it will be void as it will be contrary to the judgment of the Supreme Court. Under article 141, the law declared by the Supreme Court will be binding on all courts within the territory of India and under article 144 all authorities, civil and judicial in the territory of India shall act in aid of the Supreme Court. Now if the Parliament amends the Constitution to take away or abridge the fundamental rights, it will not be acting in aid of the Supreme Court, but will be sitting in judgment over the decision of the Supreme Court. This will bring the administration to a deadlock. If the most important institution of our country disobeys the decision made against it, other less important institutions and the citizens of the country may do likewise. If the Parliament thinks that the judgment of the Supreme

Court is wrong, it may take another opportunity when a similar question arises before the Supreme Court to raise it again and persuade the Supreme Court to take a different view. That is the way how America functions. There were many occasions in the long history of America that the Supreme Court gave judgments which were not to the liking of some of the representatives of the people. But the Congress never thought of overruling the judgments of the Supreme Court, though there were strong criticisms from different quarters and even there were some attempts now and then to pack the court though without success.

Now, coming to the practical effects of the said decision, the position is this : Right to property is only one of the fundamental rights. There are other rights like right to equality, right to freedoms, right against exploitation, right to freedom of religion, cultural and educational rights and right to constitutional remedies. Under the judgment all the amendments made upto the date the judgment was delivered, would continue to be valid in future, with the result, not only all the revolutionary agrarian reforms already made would be saved by article 31A and 31B and the 9th Schedule but the State would be in a position to introduce other and further agrarian reforms under the protection of the said article. It is true that article 31(1) will not help the State to confiscate property by bringing drastic land reforms in respect of urban property as on the rural property for a purpose not related to agrarian reforms ; but article 31(2) as now amended, and that amendment was also saved by judgment, enables the Government to acquire land by paying compensation and the adequacy thereof as interpreted by the Supreme Court is not justiciable. So too, it can introduce reasonable land reforms subject to the conditions laid down in article 31(1) and 19(1) and (2). It has also the power to impose taxes and take back money from persons with large incomes for social purposes. The only difference between the exercise of powers subject to the said provisions and that relating to agrarian reforms is that the former is justiciable whereas the latter is completely protected by article 31A. Any reasonable land reforms, or the law of taxation made in the interest of the public will always receive the approval of the courts.

Of all the criticisms made, I came across an extraordinary criticism. The gentleman who advanced that criticism quoted from the speeches of President Roosevelt and Pandit Jawaharlal Nehru with a suggestion that if the Supreme Court did not behave well, its powers might be curtailed. I do not subscribe to the theory that the courts should play the tune set by political leaders. This conception of the exercise of judicial power destroys the rule of law in our country. The Supreme Court has jurisdiction to decide disputes between not only the citizens but between citizen and the State and if a citizen comes to the court seeking

redress on the ground that his fundamental right or rights are destroyed by the State, it is the duty of the court to decide between the two objectively and impartially, irrespective of any repercussions that the judgment may have on the Parliament or on the leaders of political parties. Though Roosevelt was at the height of his popularity and was in a position to put through any reform through the Congress, it was to the standing credit of the Congress that it had rejected his Bill for packing the Supreme Court. I do not think that in the speech cited Jawaharlal Nehru meant to threaten the Supreme Court to decide cases in the manner he wanted them to do. Anyhow whatever intention he had, the Supreme Court did not rightly follow his advice.

I will close my speech with the following observations made by one of the famous authors:

A people may prefer a free Government, but if, from indolence or carelessness or cowardice, or want of public spirit, they are unequal to exertions necessary for preserving it, if they will not fight for it when it is directly attacked, if they can be deluded by artifices used to cheat them out of it, if by momentary discouragement, or temporary panic, or if by enthusiasm for an individual they can be induced to lay their liberties at the feet of even a great man, or trust him with powers which enables him to subvert their institutions, in all these cases more or less they are unfit for liberty.

It is, therefore, the duty and responsibility of the present generation which is the future custodian of the liberty of the people to see that people will not lose their liberties. I have no doubt that the present generation will rise to the occasion and will do what we have not been able to do and lead our country to prosperity so that it may take its rightful place in the comity of nations.

*Draft*

1949

*Today***Part I—The Union and its Territory**

4. Law made under article 2 and 3 to provide for the amendment of the First-Schedule and incidental and consequential matters.—(1) Any law referred to in article 2 or article 3 of this Constitution shall contain such provisions for the amendment of the First Schedule as may be necessary to give effect to the provisions of the law and may also contain such incidental and consequential provisions as Parliament may deem necessary.

(2) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purpose of article 304.

4. Law made under article 2 and 3 to provide for the amendment of the First and the Fourth Schedules and supplemental, incidental and consequential matters.—(1) Any law referred to in article 2 or article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions (including provisions as to representation in Parliament and in the Legislature or Legislatures of the State or States affected by such law) as Parliament may deem necessary.

(2) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purpose of article 368.

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### Part III—Fundamental Rights

#### General

7. Definition—In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India.

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13. Laws inconsistent with or in derogation of the fundamental rights—(1) All laws in force in the territory of India immediately before the commencement of this Constitution in so far as they are inconsistent with the provisions of this Part,

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shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void :

Provided that nothing in this clause shall prevent the State from making any law for the removal of any inequality, disparity, disadvantage or discrimination arising out of any existing law.

(3) In this article, the expression, "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom, or usage having the force of law in the territory of India or any part thereof.

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(3) In this article, unless the context otherwise requires—

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

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### **Part XI—Relations Between the Union and the States**

223. Residuary powers of legislation— (1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

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### **Part—XVI**

304. Procedure for amendment of the Constitution—(1) An amendment of the Constitution may be instituted by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a

### **Part XX—Amendment of the Constitution**

368. Procedure for amendment of the Constitution—(1) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority

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368. Procedure for amendment of the Constitution—(1) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a

### Part VI—The States

169. Abolition or creation of Legislative Councils in States—(1) Notwithstanding anything in article 168, Parliament may by law provide for the abolition of the Legislative Council of a State having such a Council or for the creation of such a Council in a State having no such Council, if the Legislative Assembly of the State passes a resolution to that effect by a majority of the total membership of the Assembly and by a majority of not less than two-thirds of the members of the Assembly present and voting.

(2) Any law referred to in clause (1) shall contain such provisions for the amendment of this Constitution as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions as Parliament may deem necessary.

169. Abolition or creation of Legislative Councils in States—(1) Notwithstanding anything in article 168, Parliament may by law provide for the abolition of the Legislative Council of a State having such a Council or for the creation of such a Council in a State having no such Council, if the Legislative Assembly of the State passes a resolution to that effect by a majority of the total membership of the Assembly and by a majority of not less than two-thirds of the members of the Assembly present and voting.

(2) Any law referred to in clause (1) shall contain such provisions for the amendment of this Constitution as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions as Parliament may deem necessary.

the States.....by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

specified in Parts A and B of the First Schedule by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

for the time being specified in Part I of the First Schedule and the Legislatures of not less than one-third of the States for the time being specified in Part III of that Schedule.

(2) Notwithstanding anything in the last preceding clause, an amendment of the Constitution seeking to make any change in the provisions of this Constitution relating to the method of choosing a Governor or the number of Houses of the Legislature in any State for the time being specified in part I of the First Schedule may be initiated by the introduction of a Bill for the purpose in the Legislative Assembly of the State or, where the State has a Legislative Council, in either House of the Legislature of the State, and when the Bill is passed by the Legislative Assembly, or, where the State has a Legislative

majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

- (a) any of the Lists in the Seventh Schedule; or
- (b) the representation of States in Parliament; or
- (c) the powers of the Supreme Court,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States

of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

- (a) article 54, article 55, article 73, article 162 or article 241, or
- (b) Chapter IV of Part V, Chapter V of Part VI or Chapter I of Part XI, or
- (c) any of the Lists in the Seventh Schedule, or
- (d) the representation of States in Parliament, or
- (e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States

majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

- (a) article 54, article 55, article 73, article 162 or article 241, or
- (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
- (c) any of the Lists in the Seventh Schedule, or
- (d) the representation of States in Parliament; or
- (e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of



continued in operation by amendment of the Constitution—Notwithstanding anything contained in article 304 of this Constitution, the provisions of this Constitution relating to the reservation of seats for the Muslims, the Scheduled Castes, the Scheduled tribes or the Indian Christians either in Parliament or in the Legislature of any State for the time being specified in Part I of the First Schedule shall not be amended during a period of ten years from the commencement of this Constitution and shall cease to have effect on the expiration of that period unless continued in operation by an amendment of the Constitution.

Council, by both Houses of the Legislature of the State, by a majority of the total membership of the Assembly or each House, as the case may be, it shall be submitted to Parliament for ratification, and when it is ratified by each House of the Parliament by a majority of the total membership of that House it shall be presented for assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill.

Explanation—Where a group of State is for the time being specified in Part III of the First Schedule, the entire group shall be deemed to be a single State for the purposes of the proviso to clause (1) of this article.

Article 305 : Reservation of seats for minorities to remain in force for only ten years unless

Deleted

## APPENDIX III

EXTRACTS FROM THE  
CONSTITUENT ASSEMBLY DEBATES

## 1. ARTICLE 12 (DRAFT ARTICLE 7)

**The Hon'ble Dr. B. R. Ambedkar:** Sir, I move:

That the following words be added at the end of article 7:  
"or under the control of the Government of India."

Sir, this amendment was thought necessary because apart from the territories which form part of India, there may be other territories which may not form part of India, but may nonetheless be under the control of the Government of India. There are many cases occurring now in international affairs where territories are handed over to other countries for the purposes of administration either under a mandate or trusteeship. I think it is desirable that there ought to be no discrimination so far as the citizens of India and the residents of those mandated or trusteeship territories are concerned in fundamental rights. It is therefore desirable that this amendment should be made so that the principle of fundamental rights may be extended to the residents of those territories as well.

—Vol. VII, p. 607.

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**Mahboob Ali Baig Sahib Bahadur:** I submit, if it is meant that all the authorities mentioned in this article have got the right to abridge rights, the fundamental rights mentioned in clause (1) of article 13, it might lead to absurd results. As I said a magistrate or even a petty officer in authority can rightly claim under this article to have the authority to abridge a citizen's rights. Therefore, my submission is, either this article is unnecessary, or if you really mean that any man or any officer in authority has got right to abridge the fundamental rights, I submit that this clause should not find a place here at all. It leads to confusion.

I wish that the Member in charge of piloting this Constitution would make it more clear and satisfy us before we are in a position to vote in favour of this resolution.

**Mr. Vice-President:** I would request Dr. Ambedkar to enlighten us about the points raised here by Mr. Ali Baig. We are laymen and we would like to hear him.

**The Hon'ble Dr. B. R. Ambedkar:** Mr. Vice-President, I must confess that although I had concentrated my attention on the speech of my friend who moved this amendment, I have not been able to follow

what exactly he wanted to know. If his amendment is to delete the whole of article 7, I can very easily explain to him why this article must stand as part of the Constitution.

The object of the fundamental rights is two-fold. First, that every citizen must be in a position to claim those rights. Secondly, they must be binding upon every authority—I shall presently explain what the word “authority” means—upon every authority which has got either the power to make laws or the power to have discretion vested in it. Therefore, it is quite clear that if the fundamental rights are to be clear, then they must be binding not only upon the Central Government, they must not only be binding upon the Provincial Government, they must not only be binding upon the Governments established in the Indian States, they must also be binding upon District Boards, Municipalities, even village panchayats and taluk boards, in fact every authority which has been created by law and which has got certain power to make laws, to make rules, or make bye-laws.

If that proposition is accepted—and I do not see anyone who cares for fundamental rights can object to such universal obligation being imposed upon every authority created by law—then, what are we to do to make our intention clear? There are two ways of doing it. One way is to use a composite phrase such as “the State”, as we have done in article 7; or, to keep on repeating every time, “the Central Government, the Provincial Government, the State Government, the Municipality, the Local Board, the Port Trust, or any other authority”. It seems to me not only most cumbersome but stupid to keep on repeating this phraseology every time we have to make a reference to some authority. The wisest course is to have this comprehensive phrase and to economise in words. I hope that my friend will now understand why we have used the word “State” in this article and why this article must stand as part of this Constitution.

—Vol. VII, p. 610.

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**Mr. Vice-President :** The next amendment is No. 246 moved by Dr. Ambedkar.

The question is: that the following words be added at the end of article 7:

“or under the control of the Government of India.”

The motion was adopted.

—Vol. VII, p. 611.

they have provided that some parts of the constitution may be changed by future constitutional amendments and other parts may not be changed. In order to avoid any such doubts I have moved this amendment and I hope it will be accepted.

**The Hon'ble Sardar Vallabhbhai Patel:** Sir, I accept the amendment.

**Mr. Promatha Ranjan Thakur:** Sir, the words are "nor shall the Union or unit.....etc." "Union" has been defined in the first clause but not "unit". That also should be defined.

**Mr. President:** The word "unit" does not occur in Mr. Santhanam's amendment and so the question does not arise.

**The Hon'ble Rev. J. J. M. Nichols-Roy (Assam : General):** Sir, we understand that there will be provincial constitutions and each province will frame its own constitution. If so, the amendment of any law relating to a province should be left to the provinces instead of the Union. The power to amend the Provincial law must lie in an autonomous province. If it is true, as we understand now, that the Union will deal with certain subjects only like Defence, External Affairs and Communications, we do not want that any provincial power should be limited by any fundamental right or any of its powers to be taken by the Union of India. Therefore, it seems to me that this amendment will be dangerous. I suggest that we should deal with all the fundamental rights first and take up this clause 2 last. I want to see whether any provision in the fundamental rights, does not encroach on the powers of an autonomous province or State.

**Mr. B. Das (Orissa : General):** I am inclined to agree with the Hon'ble Rev. Nichols-Roy, and I cannot accept Mr. Santhanam's amendment. We cannot delegate that power to the Union Legislature or the Provincial Legislature. That means that the future Constituent Assembly be called upon to make such fundamental changes that are implied by the amendment of Mr. Santhanam. I would suggest to the House to see whom we are delegating this power before we accept this amendment and leave the Provincial Legislature to do anything it likes.

**The Hon'ble Sardar Vallabhbhai Patel:** The amendment suggested would make all the fundamental rights obligatory because it is absolutely essential that this clause should be passed if these rights are considered justiciable and fundamental. If these are not justiciable then they are not consistent. But if it is considered that those clauses which confer rights on citizens, which could be enforced in law, then it is

## INTERIM REPORT ON FUNDAMENTAL RIGHTS

## 2. ARTICLE 13 (DRAFT ARTICLE 8)

*Clause 2—Application of Laws*

**The Hon'ble Sardar Vallabhbhai Patel:** Sir, I move that clause 2 be accepted. The clause runs thus:

"All existing laws, notifications, regulations, customs or usages in force within the territories of the Union inconsistent with the rights guaranteed under this part of the Constitution shall stand abrogated to the extent of such inconsistency, nor shall the Union or any unit make any law taking away or abridging any such right".

If we make a fundamental right justiciable this is not a necessary corollary of it but in this connection I should like to draw the attention of the House to paragraph 7 of the Report which says:

"Clause 2 lays down that all existing laws, regulations, notifications, customs or usage in force within the territories of the Union inconsistent with the fundamental rights shall stand abrogated to the extent of such inconsistency. While in the course of our discussions and proceedings we have kept in view the provisions of existing Statute law, we have not had sufficient time to examine in detail the effect of this clause on the mass of existing legislation. We recommend that such an examination be undertaken before this clause is finally inserted in the Constitution."

Therefore, this clause is subject to examination of its effect on the existing laws and this should be done before the Constitution is finally drafted and the clause finally adopted.

Sir, I move.

**Shri K. Santhanam:** Sir, I gave notice of an amendment but I will move it in a somewhat modified form in terms of a suggestion made by Sardar Patel. I move that in clause 2 for the words "nor shall the Union or any unit make any law taking away or abridging any such right", the following be substituted:

"Nor shall any such right be taken away or abridged except by an amendment of the Constitution".

The only reason is that if the clause stands as it is then even by amendment of the Constitution we shall not be able to change any of these rights if found unsatisfactory or inconvenient. In some constitutions

part thereof may not be then in operation either at all or in particular areas."

Sir, the reason for bringing in this amendment is this: It will be noticed that in article 8 there are two expressions which occur. In sub-clause (1) of article 8, there occurs the phrase "laws in force", while in sub-clause (2) the words "any law" occur. In the original draft as submitted to this House, all that was done was to give the definition of the term "law" in sub-clause (3). The term "laws in force" was not defined. This amendment seeks to make good that lacuna. What we have done is to split sub-clause (3) into two parts (a) and (b). (a) contains the definition of the term 'law' as embodied in the original sub-clause (3), and (b) gives the definition of the expression "laws in force" which occurs in sub-clause (1) of article 8. I do not think that any more explanation is necessary.

—Vol. VII, p. 640.

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**Mr. Naziruddin Ahmad:** Sir, I hate to waste the time of the House, but I wish to ask the House to consider the absurdity that these words which I seek to delete will lead to. The absurdity is that in the first part of clause (3) we say that "law" includes "custom or usage having the force of law in the territory of India or any part thereof." Regarded apart from the context, this is absolutely unexceptionable. Law must be supposed to include "custom or usage having the force of law", but we must look to the application of the definition in the context. This must be read along with clause (2) of article 8. In clause (2) it is stated that "the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void." I respectfully draw the attention of the House to the word "make" in line 1 and to the word "made" in line 3 of sub-clause (2). Sir, you say that "the State shall not make any law" and also that "law includes custom or usage having the force of law". Therefore, applying the explanation in clause 3(a) to clause (2), what is said is "the State shall not make any law, i.e., 'make' any custom or usage having the force of law". The point is that "custom or usage having the force of law" is not 'made' by anybody. It grows. "Custom" has been defined in the Oxford Dictionary as follows:-

Custom means in law the usage which by continuance has acquired the force of law or right especially the special use of a locality, trade, society or the like.

Therefore in no sense a custom is made by the State. A custom is made usually by the people of a locality or a family or group or the like. It is made by continuance of an observance. Here you use the words "the State shall not any law, i.e., custom or usage having the force of law". Even in

necessary that any act, custom, regulation or notification which takes away or abridges this right must be abrogated. Otherwise, it is meaningless. Therefore, Sir, I oppose the postponement of the motion. I have of course accepted Mr. Santhanam's amendment.

**Mr. President:** The mover of the Resolution has accepted Mr. Santhanam's amendment. The question now is.

"That in clause 2 for the words 'nor shall the Union or any unit make any law taking away or abridging any such right' the following be substituted:

'nor shall any such right be taken away or abridged except by an amendment of the Constitution';"

The motion was adopted.

**Mr President:** The question is—(I will now read the amended clause)—

"All existing laws, notifications, regulations, customs or usages in force within the territories of the Union inconsistent with the rights guaranteed under this part of the constitution shall stand abrogated to the extent of such inconsistency, nor shall any such right be taken away or abridged except by an amendment of the Constitution."

The Constitution will provide rules for its own amendment, and the Constitution will be amended in accordance with the rules which will be provided in the Constitution. The clause also, if necessary, may be amended in the same way as any other clause in the Constitution.

The motion was adopted.

—*Vol. III, pp. 415-417.*

## DRAFT CONSTITUTION

**The Hon'ble Dr. B. R. Ambedkar:** Sir, I move:

"That for clause (3) of Article 8, the following be substituted:—

(3) In this article—

- (a) the expression 'law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom, or usage having the force of law in the territory of India or any part thereof;
- (b) the expression 'laws in force' includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any



judgment, the proper reading, and if it was read that way, the absurdity to which my Friend referred would not arise. But I can quite understand that a person who is not properly instructed in the rules of interpretation of Statute may put the construction which my Friend Mr. Naziruddin Ahmad is seeking to put, and therefore to avoid this difficulty, with your permission, I would suggest that in the amendment which I have moved to sub-clause (3) of article 8, I may be permitted to add the following words after the words "In this article". The words which I would like to add would be:-

"Unless the context otherwise requires"

so that the article would read this way—

"In this article, unless the context otherwise requires—

(a) The expression 'law' includes any Ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law in the territory of India or any part thereof ;

(b) the expression.....

I need not read the whole thing.

So, if the context in article 8 (1) requires the term 'law' to be used so as to include custom, that construction would be possible. If in sub-clause (2) of article 8, it is not necessary in the context to read the word law to include custom, it would not be possible to read the word 'law' to include custom. I think that would remove the difficulty which my Friend has pointed out in his amendment. —Vol. VII, pp. 644-45.

### 3. ARTICLE 19 (DRAFT ARTICLE 13)

**Sardar Hukum Singh** (East Punjab ; Sikh): Mr. Vice-President, Sir, I beg to move:

"That clauses (2), (3), (4), (5) and (6) of article 13 be deleted."

Sir, in article 13(1), sub-clauses (a), (b) and (c), they give constitutional protection to the individual against the coercive power of the State, if they stood by themselves. But sub-clauses (2) to (6) of article 13 would appear to take away the very soul out of these protective clauses. These lay down that nothing in sub-clauses (a), (b), (c) of article 13 shall affect the operation of any of the existing laws, that is, the various laws that abrogate the rights envisaged in sub-clause (1) which were enacted for the suppression of human liberties for instance, the Criminal Law Amendment Act, the Press Act, and other various security Acts. If they are to continue in the same way as before, then where is

independent India the State cannot have any hand in the making of a custom or usage having the force of law. I think these words should be deleted. These are the difficulties which beset me at every stage. I submit, Sir, that these words are not happy in the context and should be deleted.

**The Hon'ble Shri B. G. Kher.** (Bombay:General): Sir, the wording is 'includes', not "means".

**Mr. Naziruddin Ahmad:** I am very glad for the interruption. It does not remove my difficulties at all. Does it mean to say that the State 'makes' a custom or usage? Still you have the difficulty to face that the State has to make a law including custom or usage.

**The Hon'ble Shri B. G. Kher:** Of course, it means 'whenever necessary'. That is always understood in law. I am sorry to interrupt.

**The Hon'ble Dr. B. R. Ambedkar:** Probably he may not find it necessary to continue his speech if I refer to him this fact, namely, that the expression "law" in (3) (a) has reference to law in 8(1).

**Mr. Naziruddin Ahmad:** I am again grateful for the kind interruption of Dr. Ambedkar that the words 'custom and usage' have the force of law and so forth. This explanation applies also to clause (2), that is, the State shall not make any law. My remarks do not relate to article 8(1) but to 8(2). The difficulty is exactly where it was. I am not wiser, though happier for the kind interruption. —Vol. VII, pp. 641-42.

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**The Hon'ble Dr. B. R. Ambedkar** (Bombay : General): Mr. Vice-President, the amendment of Mr. Naziruddin Ahmad, I think, creates some difficulty which it is necessary to clear up. His amendment was intended to remove what he called an absurdity of the position which is created by the Draft as it stands. His argument, if I have understood it correctly, means this, that in the definition of law we have included custom, and having included custom, we also speak of the State not having the power to make any law. According to him it means that the State would have the power to make custom, because according to our definition, law includes custom. I should have thought that that construction was not possible, for the simple reason that sub-clause (3) of article 8 applies to the whole of the article 8, and does not merely apply to sub-clause (2) of article 8. That being so, the only proper construction that one can put or it is possible to put would be to read the word 'Law' distributively, so that so far as article 8, sub-clause(1) was concerned, 'law' would include custom, while so far as sub-clause (2) was concerned, 'Law' would not include custom. That would be, in my

note that is appended to article 15, where the reason for the inclusion of the word "personal" is given. There it is said:

"The Committee is of opinion that the word 'liberty' should be qualified by the insertion of the word 'personal' before it, for otherwise it might be construed very widely so as to include even the freedom already dealt with in article 13."

Thus it is very clear that if the existing law relates to libel, if it relates to meetings or associations, or freedom of speech or expression, then that existing law stands in spite of that fact that article 8 says that any law in force which is inconsistent with the fundamental rights is void. So we come to this position. In the past the existing law, for instance, the Criminal Law Amendment Acts, the Press Acts or the security Acts laid down restrictions which are inconsistent with the liberties mentioned in clause (1). They shall be in operation and they are not rendered void. That seems to be the meaning that can naturally be attached to this.

The second point which I wish to submit is this. By the Constitution certain powers are given to the legislature or the executive. Whether a court can question the validity or otherwise of such action, order or law is another question. My opinion is that where there is a provision in the Constitution itself giving power to the legislature or in this case the State covering the legislature, executive, local bodies and such other institutions, the jurisdiction of the court is ousted, for the court would say that in the constitution itself power is granted to the legislature to deprive, restrict or limit the rights of the citizen and so they cannot go into the validity or otherwise of the law or order, unless as it is said there is *mala fides*. It is for the authorities to judge whether certain circumstances have arisen for which an order or law can be passed. Anyhow I pose this question to the Chairman of the Drafting Committee whether in these circumstances, viz., where there is in existence a provision in the Constitution itself empowering the legislature or the executive to pass an order or law abridging the rights mentioned in clause (1), the court can go into the merits or demerits of the order or law and declare a certain law invalid or a certain Act as not justified. In my view the jurisdiction is ousted by clearly mentioning in the constitution itself that the State shall have the power to make laws relating to libel, association or assembly in the interest of public order, restrictions on the exercise of...

**The Hon'ble Dr. B. R. Ambedkar** (Bombay : General): Sir, if I might interrupt my honourable friend, I have understood his point and I appreciate it and I undertake to reply and satisfy him as to what it means. It is, therefore, unnecessary for him to dilate further on the point.

the change ushered in and so loudly talked of? The main purpose of declaring the rights as fundamental is to safeguard the freedom of the citizen against any interference by the ordinary legislature and the executive of the day. The rights detailed in article 13(1) are such that they cannot be alienated by any individual, even voluntarily. The Government of the day is particularly precluded from infringing them, except under very special circumstances. But here the freedom of assembling, freedom of the press and other freedoms have been made so precarious and entirely left at the mercy of the legislature that the whole beauty and the charm has been taken away. It is not only the existing laws that have been subjected to this clause, but the State has been further armed with extraordinary powers to make any law relating to libel, slander etc. It may be said that every State should have the power and jurisdiction to make laws with regard to such matters as sedition, slander and libel. But in other countries like America, it is for the Supreme Court to judge the matter, keeping in view all the circumstances and the environments, and to say whether individual liberty has been sufficiently safeguarded or whether the legislature has transgressed into the freedom of the citizen. The balance is kept in the hands of the judiciary which in the case of all civilized countries has always weighed honestly, and consequently protected the citizen from unfair encroachment by legislatures. But a curious method is being adopted under our Constitution by adding these sub-clauses (2) to (6). — Vol. VII, pp 732-33.

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**Mahboob Ali Baig Sahib Bahadur:** Sir, I move:

"That the following words be inserted at the beginning of clauses (2), (3), (4), (5) and (6) of article 13 :-

"Without prejudice and subject to the provisions of article 8."

My purpose in moving this amendment is twofold. Firstly, I want to know the mind of Dr. Ambedkar and the Drafting Committee how article 8 stands in relation to these provisos. It may be asked whether these clauses (2) to (6) are governed by article 8 or not. If these clauses are governed by article 8, may I refer to article 8 itself. It says :

"All laws in force immediately before the commencement of this Constitution in the territory of India, in so far as they are inconsistent with the provisions of this Part".

The words "inconsistent with the provisions of this Part" do not affect the existing laws relating to libel, the existing laws relating to restrictions on the exercise of the rights with regard to association or assembly. That means that the existing laws mentioned in clauses (2) to (6) are not all rendered void under Article 8. The intention is clear from the foot-

sub-clauses (3), (4), (5) and (6). I will read for illustration sub-clause (3) with my amendment.

"Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law, imposing in the interests of public order".

I am accepting Mr. Bhargava's amendment and so I will add the word "reasonable" also.

"imposing in the interests of public order reasonable restrictions on the exercise of the right conferred by the said sub-clause."

Now, the words "in so far as it imposes" to my mind make the idea complete and free from any doubt that the existing law is saved only in so far as it imposes reasonable restrictions. I think with that amendment there ought to be no difficulty in understanding that the existing law is saved only to a limited extent, it is saved only if it is not in conflict with the fundamental rights.

Sub-clause (6) has been differently worded, because the word there is different from what occurs in sub-clauses (3), (4) and (5). Honourable Members will be able to read for themselves in order to make out what it exactly means.

Now, my friend, Pandit Thakur Dass Bhargava entered into a great tirade against the Drafting Committee, accusing them of having gone out of their way to preserve existing laws. I do not know what he wants the Drafting Committee to do. Does he want us to say straightway that all existing laws shall stand abrogated on the day on which the Constitution comes into existence?

**Pandit Thakur Dass Bhargava:** Not exactly.

**The Hon'ble Dr. B. R. Ambedkar:** What we have said is that the existing law shall stand abrogated in so far as they are inconsistent with the provisions of this Constitution. Surely the administration of this country is dependent upon the continued existence of the laws which are in force today. It would bring down the whole administration to pieces if the existing laws were completely and wholly abrogated.

Now I take article 307. He said that we have made provisions that the existing laws should be continued unless amended. Now, I should have thought that a man who understands law ought to be able to realize this fact that after the Constitution comes into existence, the exclusive power of making law in this country belongs to Parliament, or to the several legislatures in their respective spheres. Obviously, if you enunciate

**Mahboob Ali Baig Sahib Bahadur:** The third point which I would submit is this. The new set up would be what is called parliamentary democracy or rule by a certain political party, by the party executive or party government and we can well imagine what would be the measure of fundamental rights that the people would enjoy under parliamentary democracy or rule by a party. In these circumstances is it not wise or necessary in the interest of the general public that the future legislatures ruled by a party or the executive ruled by a party are not given powers by this very constitution itself? For as has been said 'power corrupteth' and if absolute power is placed in the hands of party government by virtue of the terms of this constitution itself, such legislature or executive will become absolutely corrupt. Therefore, I move that if at all these provisos are necessary they must be subject to the provision that no law can be passed, no law would be applicable which is inconsistent with the freedoms mentioned in sub-clause (1).—*Vol. VII, pp. 734-35.*

**The Hon'ble Dr. B. R. Ambedkar:** From the speeches which have been made on article 13 and article 8 and the words "existing law" which occur in some of the provisos to article 13, it seems to me that there is a good deal of misunderstanding about what is exactly intended to be done with regard to existing law. Now the fundamental article is article 8 which specifically, without any kind of reservation, says that any existing law which is inconsistent with the fundamental rights as enacted in this part of the Constitution is void. That is a fundamental proposition and I have no doubt about it that any trained lawyer, if he was asked to interpret the words "existing law" occurring in the sub-clauses to article 13, would read "existing law" in so far as it is not inconsistent with the fundamental rights. There is no doubt that that is the way in which the phrase "existing law" in the sub-clauses would be interpreted. It is unnecessary to repeat the proposition stated in article 8 every time the phrase "existing law" occurs, because it is a rule of interpretation that for interpreting any law, all relevant sections shall be taken into account and read in such a way that one section is reconciled with another. Therefore, the Drafting Committee felt that they have laid down in article 8 the full and complete proposition that any existing law, in so far as it is inconsistent with the fundamental rights, will stand abrogated. The Drafting Committee did not feel it necessary to incorporate some such qualification in using the phrase "existing law" in the various clauses where these words occur. As I see, many people have not been able to read the clause in that way. In reading "existing law", they seem to forget what has already been stated in article 8. In order to remove the misunderstanding that is likely to be caused in a layman's mind, I have brought forward this amendment to

## 4. ARTICLE 352 (DRAFT ARTICLE 275)

**Shri T. T. Krishnamachari:** If some people criticize here that inroads have been made into the Fundamental Rights, that the citizen's privileges are curtailed, what will the representatives of the citizen in Parliament be doing at that time? Why should my honourable Friend, Mr. Tajamul Husain, take serious objection to any temporary curtailment of the free exercise of civil liberty, as it is called—God knows what it really means—so long as there are 750 people in the Centre who have to exercise a watchful control to see that that is not unnecessarily abridged? I have no doubt that Mr. Tajamul Husain himself will agree that there must be a necessity for civil liberty to be abridged in certain contingencies. Take, for instance, rationing. It is undoubtedly a curtailment of the civil liberty. I cannot go and get a maund of rice or wheat. We tolerate that and we should probably have to do something more than that in order to help the State through an emergency and to safeguard the Constitution, and if the civil liberties of the people are unduly restricted, I say the responsibility will be that of the ultimate rulers of the people, not that of the executive and if the executive does not obey the call of the people who are watchful, that executive will have to go provided the people's representatives assert themselves. Therefore, I feel that this cry that these provisions will unduly abridge the civil liberties of the people is not right so long as we have not abridged the powers of Parliament to see that the Government of the day does allow people that amount of civil liberty consistent with the safety of the realm and safety of the Constitution. Therefore, I say that most of the points that have been raised against these provisions are pointless because the powers of the Parliament are preserved and all that I wanted to convey by intervening in the debate was to say that nobody will be happy that he has to put the provision in this Constitution, but at the same time we would be failing in our duty if we do not put provisions in the Constitution which will enable those people who have the control of the destinies of the country in future times to safeguard the Constitution, so that people here in this House and elsewhere will understand that these emergency provisions have got to be tolerated as a necessary evil, and without those provisions it is well nigh possible that all our efforts to frame a Constitution may ultimately be jeopardized and the Constitution might be in danger unless adequate powers are given to the executive to safeguard the Constitution. Sir, I support the amendment moved by the Honourable Dr. Ambedkar....

**Mr. President:** I think that Mr. T. T. Krishnamachari has dealt with all points that have been raised and it may not be necessary for you to reply to the points which have been raised by the Members.—*Vol. IX, pp. 122-25.*

the proposition that hereafter no law shall be in operation or shall have any force or sanction, unless it has been enacted by parliament, what would be the position? The position would be that all the laws which have been made by the earlier legislature, by the Central Legislative Assembly or the Provincial Legislative Assembly would absolutely fall to pieces, because they would cease to have any sanction, not having been made by the Parliament or by the local legislatures, which under this Constitution are the only body which are entitled to make law. It is, therefore, necessary that a provision should exist in the Constitution that any laws which have been already made shall not stand abrogated for the mere reason that they have not been made by Parliament. That is the reason why article 307 has been introduced into this Constitution. I, therefore, submit, Sir, that my amendment which particularises the portion of the existing law which shall continue in operation so far as the fundamental rights are concerned, meets the difficulty, which several honourable Members have felt by reason of the fact that they find it difficult to read article 13 in conjunction with article 8. I, therefore, think that this amendment of mine clarifies the position and hope the House will not find it difficult to accept it.

—*Vol. VII, pp. 740-42.*

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**Sardar Hukum Singh:** Sir, I beg to move:

“That in clause (5) of article 13, after the words ‘existing law’ the word ‘which is not repugnant to the spirit of the provisions of article 8’ be inserted”.

The Honourable Dr. Ambedkar has rightly appreciated our fears and we feel that is the object of most of the amendments that have been moved. Certainly there are fears in our minds that if these articles stand independently—articles 8 and 13—then there is a danger of different constructions being put on them. Dr. Ambedkar has emphasised that if relevant articles of the Constitution are in question, all those articles that relate to one subject shall be taken into consideration when some construction is going to be put by any Court and then article 8 would govern because it says that “All laws in force immediately before the commencement of this Constitution in the territory of India, in so far as they are inconsistent with the provisions of this Part, shall to the extent of such inconsistency, be void.” That we have adopted, and this is what we feel that it should be made clear that certainly those parts which are inconsistent would be void to that extent. If that is the object as Dr. Ambedkar has explained, then why not make it clear in this section as well. Where is the harm? I do not see that we would lose anything or that it would change the beauty of the phraseology even if we make it clear that these provisions are subject to article 8.—*Vol. VII, pp. 744-45.*



## 6. ARTICLE 359 (DRAFT ARTICLE 280)

**The Hon'ble Dr. B. R. Ambedkar:** Sir, I move:

"That for the existing article 280, the following article be substituted :—

"280. Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of the rights conferred by Part III of this Constitution and all proceedings pending in any court for the enforcement of any right so conferred shall remain suspended for the period during which the Proclamation is in operation or for such shorter period as may be specified in the order."

The House will see that this article 280 is really an improvement on the original article 280. The original article 280 provided that the order of the President suspending the operation of article 25 should continue for a period of six months after the proclamation has ceased to be in operation. That is to say, that the guarantee such as *habeas corpus*, writs and so on, would continue to be suspended even though the necessity for suspension had expired. It has been felt that there is no reason why this suspension of the guarantee should continue beyond the necessities of the case. In fact the situation may so improve that the guarantees may become operative even though the Proclamation has not ceased to be in operation. In order, therefore, to permit that the suspension order shall not continue beyond the Proclamation, and may even come to an end much before the time the Proclamation has ceased to be in force, this new draft has been presented to this Assembly, and I hope the Assembly will have no difficulty in accepting this.

—Vol. IX, p. 186.

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**The Hon'ble Dr. B. R. Ambedkar:** May I say a word? In view of the point that has been made as to whether the suspension of the proceedings should take place by the order of the President which of course means on the advice of the Executive, which of course also means that the Executive has the confidence of the Legislature, there is no doubt a difference of opinion as to whether suspension should take place by an act of the Executive or by law made by Parliament. I should like therefore that this article may be held over to provide the Drafting Committee opportunity to consider the matter. We might take up the other articles.

**Mr. President:** This article may be held over. —Vol. IX, p. 198.

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**The Hon'ble Dr. B. R. Ambedkar:** Sir, I move :

"That for article 280, the following article be substituted :—

## 5. ARTICLE 358 (DRAFT ARTICLE 279)

**Shri Brajeshwar Prasad:** Let the Drafting Committee explain the provisions of article 279, but I am quite clear in mind that article 279 means that the State Legislature can make laws during an emergency restricting freedom of speech irrespective of article 13. This is my interpretation. I do not know if it is correct. If we do any act in politics, it results in either of two ways. Either we expand man's liberty or restrict it. There is no third possibility. I feel that during a period of emergency the executive and the legislature should have the power to restrict man's liberty.

**The Hon'ble Dr. B. R. Ambedkar:** Mr. President, I think there are only two points which have been raised which require a reply. The amendment which has been moved by my Friend Professor Saksena was to the effect that any change in the Fundamental Right should be made by Parliament and not by the State during emergency. Now if my friend were to refer to the provisions of article 13, he himself will find that we have permitted both the Centre and the Province to make any changes which may affect the Fundamental Rights provided the changes made by them are reasonable. Therefore under normal circumstances, the authority to make laws affecting Fundamental Rights is vested in both and there is no reason why, for instance, this normal right which the State possess should be taken away during emergency.

**Prof. Shibban Lal Saksena:** But they will be suspended during emergency.

**The Hon'ble Dr. B. R. Ambedkar:** Suspension comes in another article. This article merely says that power may be exercised by the State—meaning both Parliament as well as the provinces—notwithstanding whatever is said in article 13.

**Prof. Sibban Lal Saksena:** During emergency?

**The Hon'ble Dr. B. R. Ambedkar:** Yes. Because that is a normal power even in other cases. When there is no emergency both have got power to legislate on the subject. I see, therefore, no reason why that power should be taken away during emergency. On the other hand I should have thought that emergency was one of the reasons why such a power should be given to the State.

Then with regard to my Friend Mr. Kamath's criticism that the next article 280, was enough for the purpose, I think that is a misunderstanding of the whole situation, because unless power is given to modify, the suspension has no consequence at all. Therefore article 280 deals with quite a separate matter and has nothing to do with this article. This article should be accepted in the form in which it is proposed. —*Vol. IX, p. 185.*

Therefore, my friends who have spoken against that article will, I hope, understand that I am in no sense an opponent of what they have said. In fact I respect their sentiments very much. All the same I am sorry to say that I do not find possible to accept either any of the amendments which they have moved or the suggestions that they have made. I remain, if I may say so, quite unconvinced. At the same time, I may say that I am no less fond of the fundamental rights than they are.

*I propose to deal in the course of my reply with some general questions.* It is, of course, not possible for me to go into all the detailed points that have been urged by the various speakers. The first question is whether in an emergency there should be suspension of the fundamental rights or there should be no suspension at all, in other words, whether our fundamental rights should be absolute, never to be varied, suspended or abrogated, or whether our fundamental rights must be made subject to some emergencies. I think I am right in saying that a large majority of the House realises the necessity of suspending these rights during an emergency; the only question is about the ways and means of doing it.

Now if it is agreed that it is necessary to provide for the suspension of these rights during an emergency, the next question that legitimately arises for consideration is whether the power to suspend them should be vested absolutely in the President or whether they should be left to be determined by Parliament. Now having regard to what is being done in other countries—and I am sure every one in this House will agree that we must draw upon the experience and the provisions contained in the constitutions of other countries—the position is this. As to the suspension of the right of what is called *habeas corpus* the matter under the English law must of course be dealt with by law. It is not open to the executive to suspend the right of *habeas corpus*. That is the position in Great Britain. Coming next to the position in the United States, we find that while the Congress has power to deal with what are called constitutional guarantees including the suspension of the writ of *habeas corpus*, the President is not altogether left without any power to deal with the matter. I do not want to go into the detailed history of the matter. But I think *I am right in saying that while the power is left with the Congress, the President is also vested with what may be called the ad interim power to suspend the writ.* My friends shake their heads. But I think if they referred to a standard authority Corwin's book on the President, they will find that that is the position.

**Pandit Hirday Nath Kunzru:** Will you let me interrupt him, Sir? I am sure he is familiar with Ogg's Government of America. Perhaps he will regard that book as a standard book.

'280 (1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III of this Constitution as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the Order.

- (2) An order made as aforesaid may extend to the whole or any part of the territory of India.
- (3) Every order made under clause (1) of this article shall as soon as may be after it is made be laid before each House of Parliament."

Sir, the House will realise that clauses (2) and (3) are additions to the old article. In the old article there was a provision that while a Proclamation of Emergency was in force the President may suspend the provisions for the rights contained in Part III throughout India. Now, it is held that, notwithstanding the fact that there may be emergency, it may be quite possible to keep the enforcement of the rights given by Part III in certain areas intact and there need not be a universal suspension throughout India merely by reason of the Proclamation. Consequently clause (2) has been introduced into the draft article to make that provision.

Thirdly, the original article did not contain any provision permitting Parliament to have a say in the matter of any order issued under clause (1). It was the desire of the House that the order of suspension should not be left absolutely unfettered in the hands of the President and consequently it is now provided that such an order should be placed before Parliament, no doubt with the consequential provisions that Parliament will be free to take such action as it likes.—*Vol. IX, pp. 523-24.*

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**The Hon'ble Dr. B. R. Ambedkar:** Sir, I am not at all surprised at the strong sentiments which have been expressed by some speakers who have taken part in the debate on this article against the provisions contained in the clause as I have put forward. The article deals with fundamental matters and with vital matters relating to rights of the people and it is, therefore, proper that we should approach a subject of this sort only with caution but—I am also prepared to say—with some emotion. We have passed certain fundamental rights already and when we are trying to reduce them or to suspend them we should be very careful as to the ways and means we adopt in curtailing or suspending them.

the matter may be clear to him I would like again to draw his attention to article 227. If he compares the two, he will see that there is a fundamental difference between the two articles. Article 227 is also an article which gives power to the Centre to pass certain laws in an emergency even affecting the State List. I would draw his attention to clause (2) of article 227. He will find at the end of it that 'all acts cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate except as respects things done or omitted to be done before the expiration of the same period'. This clause does not occur in article 279. Therefore, not only any law that will be made under the provisions of article 279 will vanish, but anything done will also cease to be validly done. Thus a person who was arrested under the provisions of any law made under article 279, would when the law has ceased to be in force not be governed by it merely because it has been done under any law made under that article. Under this article 279, not only the law goes, but the act done also goes.

Then I would draw attention to clause (2) of article 8. That again is an important article which must be read with article 279. Article 8 is an exception to the general provisions contained in this Constitution that the existing law will continue to operate. What article 8 says is that any existing law which is inconsistent with any of fundamental rights will be inoperative. Article 8 clause (1) deals with the existing law and clause (2) deals with future law. Thus, 'any law made under article 279' would be a future law. When the emergency ceases any law made under article 279 will come under clause (2) of article 8 so that if it becomes inconsistent with the fundamental rights it would automatically cease.

Therefore, my submission is that, so far as amendment 74 is concerned the fears expressed are groundless. There is ample provision in the existing law which would cover all the cases my honourable Friend Pandit Thakur Das Bhargava has in mind.

**Pandit Thakur Das Bhargava:** In article 227(2) the reference is to a law made by Parliament. It has no reference to any action taken by the executive. Secondly, it speaks of law made by Parliament whereas under article 13 we have reference to law made by a State as defined therein.

**The Hon'ble Dr. B. R. Ambedkar:** The State there means both, because the word 'State' used in article 279 is used in the same sense in which it is used in Part III where it means both the Centre, the provinces and even the municipalities.

**Pandit Thakur Das Bhargava:** Whereas in 227 (1) the reference is only to Parliament.

**The Hon'ble Dr. B. R. Ambedkar:** Yes. That is not the only book. There are one hundred books on the American Constitution. I am certainly familiar with some fifty of them.

**Pandit Hirday Nath Kunzru:** It is stated there that the best legal opinion is that the right to suspend the privilege of the writ of *habeas corpus* vests in the Congress and that the President may exercise it only where, as Commander-in-Chief of the Armed Forces, he considers it necessary for the security of the military operations.

**The Hon'ble Dr. B. R. Ambedkar:** Yes. My submission is that in the United States while the Congress has the power, the President also, as the Executive Head of the State, has the *ad interim* power to suspend.

Now, in framing our Constitution, we have more or less followed the American precedent. By the amendment which I have made, Parliament has been now vested with power to deal with this matter. We also propose to give the President an *ad interim* power to take such action as he thinks is necessary in the matter of the constitutional guarantee.

Therefore, comparing the draft article and comparing the position as you find in the United States, there is certainly not very great difference between the two. Here also the President does not take action in his personal capacity. We have a further safeguard which the American Constitution does not have, namely, our President will be guided by the advice of the executive and, our executive would be subject to the authority of Parliament. Therefore, so far as the question of vesting all the power to suspend the guarantees is concerned, my submission is that ours is not altogether a novel proposal which is made without either reference to any precedent or made in a wanton manner without caring to what happens to the fundamental rights.

Now, having dealt with that question, I come to amendment No. 74 of Mr. Bhargava. I think that is an important matter and should, therefore, explain what exactly the provision is. His amendment really refers to article 279, although he has put it as an amendment to article 280. What he wants is that any action taken by the State under the authority conferred upon it by the emergency provisions to suspend the fundamental rights should automatically cease with the ceasing of the Proclamation. I think that is what he wants so far as amendment No. 74 is concerned. My submission is that if the article is read properly, that is exactly what it means. I would like to draw his attention to article 279. He will see that that article does not save anything done under any law made under the powers given by the emergency. In order that

and my original proposal is "as soon as possible". Well I do not know whether anybody wants to make this a matter of conscience and if this matter was not guaranteed, we are going to fast unto death. I think "as soon as possible" may be worked in such a manner that the matter may be placed before Parliament within one month, within two months or may be even a fortnight. It is a most elastic phrase and, therefore, I submit that the provision as contained in the draft is the best under the circumstances and I hope the House will accept it. — *Vol. IX, pp. 548-51*

## 7. ARTICLE 368 (DRAFT ARTICLE 304)

**The Hon'ble Dr. B. R. Ambedkar:** The provisions relating to amendment of the Constitution have come in for a virulent attack at the hands of the critics of the Draft Constitution. It is said that the provisions contained in the Draft make amendment difficult. It is proposed that the Constitution should be amendable by a simple majority at *least for some years. The argument is subtle and ingenious. It is said that this Constituent Assembly is not elected on adult suffrage while the future Parliament will be elected on adult suffrage and yet the former has been given the right to pass the Constitution by a simple majority while the latter has been denied the same right. It is paraded as one of the absurdities of the Draft Constitution. I must repudiate the charge because it is without foundation. To know how simple are the provisions of the Draft Constitution in respect of amending the Constitution one has only to study the provisions for amendment contained in the American and Australian Constitutions. Compared to them those contained in the Draft Constitution will be found to be the simplest. The Draft Constitution has eliminated the elaborate and difficult procedure such as a decision by a convention or a referendum. The powers of amendment are left with the Legislature, Central and Provincial. It is only for amendments of specific matters—and they are only few—that the ratification of the State legislatures is required. All other articles of the Constitution are left to be amended by Parliament. The only limitation is that it shall be done by a majority of not less than two-thirds of the members of each House present and voting and a majority of the total membership of each House. It is difficult to conceive a simpler method of amending the Constitution.*

What is said to be the absurdity of the amending provisions is founded upon a misconception of the position of the Constituent Assembly and of the future Parliament elected under the Constitution. The Constituent Assembly in making a constitution has no partisan motive. Beyond securing a good and workable constitution it has no axe to grind. In considering the articles of the Constitution it has no eye on getting through a particular measure. The future Parliament if it met as a

**The Hon'ble Dr. B. R. Ambedkar:** That is what I say. 279 will also be governed by article 8. Therefore, any law which is inconsistent with the fundamental rights granted will cease to operate.

Now I proceed to deal with amendment No. 78 of Pandit Bhargava. In that amendment he has stated that the order issued by the President suspending the provisions of any of these fundamental rights shall be expressly ratified. He says that there must be express ratification by Parliament of an order issued by the President. The draft article proposed by the Drafting Committee provides that the ratification may be presumed unless Parliament by a positive action cancels the order of the President. That is the real difference between his amendment and the article as I have formulated.

**Pandit Thakur Das Bhargava:** But it is very fundamental difference.

**The Hon'ble Dr. B. R. Ambedkar:** That is a very fundamental thing. In a sense it is fundamental and in a sense it is not fundamental because we have provided that the Proclamation shall be placed before the Parliament. That obligation I have now imposed. Obviously, if the Parliament is called and the Proclamation is placed before it, it would be a stupid thing if the people who come into the Parliament do not take positive action and such a Parliament would be an unnecessary thing and not wanted.

**Pandit Thakur Das Bhargava:** It is not necessary to say that the law will only be applicable for the period of the emergency and not for shorter period and not for six months after the proclamation?

**The Hon'ble Dr. B. R. Ambedkar:** I am coming to that, but so far as this question is concerned, it is a matter of mere detail whether the Parliament should by an express resolution say that we want the President to withdraw it, or we want the President to continue it, or we want the President to continue it in a modified form. Once Parliament is called and Parliament has become seized of the matter, is it not proper that the matter should be left to Parliament and its consent presumed to have been given unless it has decided otherwise? Where is the difficulty? I do not see anything with regard to the amendment.

**An honourable Member:** It is one o' clock now.

**Mr. Vice-President:** We are going to finish this article.

**The Hon'ble Dr. B. R. Ambedkar:** Mr. Gupte has moved an amendment which is an amendment to the amendment of Pandit Bhargava, No. 78. He wants that a definite period should be mentioned, that the Proclamation should be placed before Parliament within two months. Pandit Bhargava's amendment was one month, I think, if I mistake not



- (c) any of the Lists in the Seventh Schedule, or
- (d) the representation of States in Parliament, or
- (e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States for the time being specified in Parts I and III of the First Schedule by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent'."

Sir, I do not wish to say anything at this stage because I anticipate that there would be considerable debate on this article and I propose to reserve my remarks towards the end so that I may be in a position to explain the points that might be raised against this amendment.

—Vol. IX, p. 1643.

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**Dr. P. S. Deshmukh:** Then there is another amendment, No. 212, Sir, I move:

"That with reference to amendment No. 118 of List II (Eighth Week), after article 304, the following new article be inserted:—

'304-A. Notwithstanding anything contained in this Constitution to the contrary, no amendment which is calculated to infringe or restrict or diminish the scope of any individual rights, any rights of a person or persons with respect to property or otherwise, shall be permissible under this Constitution and any amendment which is or is likely to have such an effect shall be void and *ultra vires* of any Legislature'."

—Vol. IX, p. 1644.

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**The Hon'ble Dr. B. R. Ambedkar:** Mr. President, Sir, of the many amendments that have been made and the speeches made thereon, it is not possible for me to pursue every amendment and to pursue every speaker. But I am going to take as a general alternative suggested by the various speakers that our Constitution should be made open for amendment by the future Parliament either by a simple majority or by a method which is much more facile than that embodied in article 304.

Sir, before I proceed to explain the provisions contained in article 304, I should like to remind the House of the provisions which are contained in other constitutions on the question of amending the Constitution. I should begin by telling the House that the Canadian Constitution does not contain any provision for the amendment of the Canadian Constitution. Although Canada today is a Dominion, is a sovereign State with all the attributes of sovereignty and the power to

Constituent Assembly, its members will be acting as partisans seeking to carry amendments to the Constitution to facilitate the passing of party measures which they have failed to get through Parliament by reason of some article of the Constitution which has acted as an obstacle in their way. Parliament will have an axe to grind while the Constituent Assembly has none. That is the difference between the Constituent Assembly and the future Parliament. That explains why the Constituent Assembly though elected on limited franchise can be trusted to pass the Constitution by simple majority and why the Parliament though elected on adult suffrage cannot be trusted with the same power to amend it.

—*Vol. VII, pp. 43-44.*

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**The Hon'ble Dr. B. R. Ambedkar:** Sir, I move:

"That for article 304, the following be substituted:—

'304. An amendment of the Constitution may be initiated by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill the Constitution shall stand amended in accordance with the terms of the Bill.

Provided that if such amendment seeks to make any change in—

- (a) any of the Lists in the Seventh Schedule, or
- (b) the representation of States in Parliament, or
- (c) Chapter IV of Part V, Chapter VII of Part VI, and article 213A of this Constitution,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States for the time being specified in Parts I and III of the First Schedule'."

I will move my other amendment also, No. 207. I move:

"That in amendment No. 118 of List III (Eighth Week), for the proviso to the proposed article 304 the following proviso be substituted:—

'Provided that if such amendment seeks to make any change in—

- (a) article 43, article 44, article 60, article 142 or article 213A of this Constitution, or
- (b) Chapter IV of Part V, Chapter VII of Part VI, or Chapter I of Part IX of this Constitution, or

be open to amendment by Parliament by a simple majority. That fact unfortunately has not been noticed by reason of the fact that mention of *this matter has not been made in article 304, but in different other articles of the Constitution.* Let me refer to some of them. Take for instance articles 2 and 3 which deal with the States. So far as the creation of new States is concerned or the re-constitution of existing States is concerned, this is a matter which can be done by Parliament by a simple majority. Similarly, take for example article 148-A which deals with the Upper Chambers in the provinces. Parliament has been given perfect freedom to either abolish the Upper Chambers or to create new Second Chambers in provinces which do not now have them by a simple majority. Now take article 213 which deals with the States in Part II. With regard to the constitution of the States, the draft Constitution also leaves the making of constitution of States in Part II and their modification to Parliament to be decided by a simple majority.

Again take Schedules V and VI. They are also left to be amended by Parliament by a simple majority. I can cite innumerable articles in the Constitution, such as articles 255, which deals with grants and financial provisions, which leave the matter subject to law made by Parliament. The provisions are 'until Parliament otherwise provides'. Therefore in many matters—I have not had time to examine the whole of the draft Constitution and so I am only just illustrating my point—we have left things in our Constitution in a way which is capable of being amended by a simple majority. If my friends, who have been persisting in the criticism that Parliament should have more extensive powers of amending or altering the Constitution by a simple majority, had suggested to me a concrete case and referred to any definite article that that should also be put in that category, it would have been open to the Drafting Committee to consider the matter. Instead of that, to say that the whole of the Constitution should be left liable to be amended by Parliament by majority is, in my judgment, too extravagant and too tall an order to be accepted by people responsible for drafting the Constitution.

Therefore, the first point which I wanted to emphasize was that it is absolutely a misconception to say that there is no article in the Constitution which could not be amended by Parliament by a simple majority. As I said, we have any number of articles in our Constitution which it would be open for Parliament to amend by a bare majority.

Now, what is it we do? We divide the articles of the Constitution under three categories. The first category is the one which consists of articles which can be amended by Parliament by a bare majority. The second set of articles are articles which require two-thirds majority. If the future Parliament wishes to amend any particular article which is

alter the Constitution, the Canadians have not thought it fit to introduce a clause even now permitting the Canadian Parliament to amend their Constitution. It has also to be remembered that the Canadian Constitution was forged as early as 1867 and there is not the slightest doubt about it in the mind of anybody who has read the different books on the Canadian Constitution that there has been a great deal of *discontent* over the various clauses in the Canadian Constitution and even on the interpretation given by the Privy Council on the provisions of the Canadian Constitution; nonetheless the Canadian people have not thought fit to employ powers that have been given to them to introduce a clause relating to the amendment of the Constitution.

I come to the Irish Constitution. In the Irish Constitution there is a provision that both Houses by a simple majority may alter, or repeal any part of the Irish Constitution provided that the decision of the Houses to amend, repeal or alter the Constitution is submitted to the people in a referendum and approved by the people by a majority.

Then let us take the Swiss Constitution. In that Constitution too, the legislature may pass an amending Bill, but that amendment does not have any operative force unless two conditions are satisfied: one is that the majority of the cantons accept the amendment, and secondly—there is a referendum also—in the referendum the majority of the people accept the amendment. The mere passing of a Bill by the Legislature in Switzerland has no effect so far as changing the Constitution is concerned.

Let me now take the Australian Constitution. In that Constitution the provision is this: That the amendment must be passed by an absolute majority of the Australian Parliament. Then, after it has been so passed, it must be submitted to the approval of persons who are entitled to elect representatives to the Lower House of the Australian Parliament. Then again it has to be submitted to a referendum of the people or the electors. A further condition is this: that it must be accepted by a majority of the States and also by a majority of the electors.

In the United States Constitution the provision is that an amendment must be accepted by two-thirds majority of both Houses subject to the fact that the decision of both Houses by two-thirds majority must be ratified by the decision of two-thirds majority of the States in favour of the amendment. I cite these facts in order to point out that in no country to which I have made reference it is provided that the Constitution should be amended by a simple majority.

Now let me turn to the provision of our Constitution. What is it that we propose to do with regard to amendment of our Constitution? We propose to divide the various articles of the Constitution into three categories. In one category we have placed certain articles which would

not mentioned in Part III or article 304, all that is necessary for them is to have two-thirds majority. Then they can amend it.

**Mr. President:** Of Members present.

**The Hon'ble Dr. B. R. Ambedkar:** Yes. Now, we have no doubt put certain articles in a third category where for the purposes of amendment the mechanism is somewhat different or double. It requires two-thirds majority plus ratification by the States. I shall explain why we think that in the case of certain articles it is desirable to adopt this procedure. If Members of the House who are interested in this matter are to examine the articles that have been put under the proviso, they will find that they refer not merely to the Centre but to the relations between the Centre and the Provinces. We cannot forget the fact that while we have in a large number of cases invaded provincial autonomy, we still intend and have as a matter of fact seen to it that the federal structure of the Constitution remains fundamentally unaltered. We have by our laws given certain rights to provinces, and reserved certain rights to the Centre. We have distributed legislative authority; we have distributed executive authority and we have distributed administrative authority. Obviously to say that even those articles of the Constitution which pertain to the administrative, legislative, financial and other powers, such as the executive powers of the provinces should be made liable to alteration by the Central Parliament by two-thirds majority, without permitting the provinces of the States to have any voice, is in my judgment altogether nullifying the fundamental of the Constitution. If my honourable Friends were to refer to the articles which are included in the proviso they will see that we have selected very few. Article 43 deals with the election of the President; article 44 deals with the manner of election of the President. It was the view of the Drafting Committee that the President while no doubt in charge of the affairs of the Centre, nonetheless was the head of the Union, and as such, the provinces were as much interested in his election and in the manner of his election as the Centre. Consequently we thought that this was a proper matter to be included in that category of articles which would require ratification by the provinces.

Take article 60 and article 142. Article 60 deals with the extent of the executive authority of the Union and article 142 deals with the extent of the executive authority of the State. We have laid down in our Constitution the fundamental proposition that executive authority shall be co-extensive with legislative authority. Supposing, for instance, the Parliament has the power to make an alteration in article 60 for extending its executive authority beyond the provisions or the limit contained in article 60, it would undoubtedly undermine or limit the executive authority of the States as defined in article 142, and we therefore thought

"That before clause (1) of article 304, the following new clause be inserted and the existing clauses be renumbered accordingly:

'(1) Any provision of this Constitution may be amended whether by way of variation, addition or repeal, in the manner provided in this article'."

*The amendment was negatived.*

**Mr. President:** The question is:

"That in clause (1) of article 304, for the words 'An amendment', the words 'A proposal for an amendment' be substituted."

*The amendment was negatived.*

**Mr. President:** The question is:

"That in clause (1) of article 304, for the words 'it shall be presented to the President for his assent and upon such assent being given to the Bill' the words 'it shall upon presentation to the President, be signed by him' be substituted."

*or alternatively*

"That in clause (1) of article 304, for the words 'it shall be presented to the President for his assent and upon such assent being given to the Bill', the words 'it shall upon presentation to the President, receive his assent' be substituted."

*The amendment was negatived.*

**Mr. President:** The question is:

"That in clause (1) of article 304, the words 'to the Bill' occurring in the 11th line be deleted."

*The amendment was negatived.*

**Mr. President:** The question is:

"That before the proviso to clause (1) of article 304, the following new proviso be inserted:—

'Provided that a period of not less than six months intervenes between the initiation of the Bill and its final passage in Parliament'."

*The amendment was negatived.*

**Mr. President:** There was one amendment, *i.e.*, No. 3261 which was really not moved, standing in the name of Acharya Jugal Kishore.

**Acharya Jugal Kishore:** I do not want this to be put to vote.

**Mr. President:** These are all the amendments on the Printed List. Then we come to the amendments in the cyclostyled Order Paper.

to suggest and find out what defects there are. That would be an honest procedure and I have no objection to it at all.

If that is not the ground on which the argument rests, then the other ground is that this Constitution proceeds on some wrong principles. Sir, so far as this matter is concerned, it seems to me that a modern constitution can proceed only on two bases: One base is to have a parliamentary system of government. The other base is to have a totalitarian or dictatorial form of government. If we agree that our Constitution must not be a dictatorship but must be a constitution in which there is parliamentary democracy where government is all the time on the anvil, so to say, on its trial, responsible to the people, responsible to the judiciary, then I have no hesitation in saying that the principles embodied in this Constitution are as good as, if not better than, the principles embodied in any other parliamentary constitution.

The other argument which perhaps might have been urged—I was not able to hear every Member who spoke—is that this Assembly is not a representative assembly as it has not been elected on adult suffrage, that the large mass of the people are not represented in this Constitution. Consequently this Assembly in framing the Constitution has no right to say that this Constitution should have the finality which article 304 proposes to give it. Sir, it may be true that this Assembly is not a representative assembly in the sense that Members of this Assembly have not been elected on the basis of adult suffrage. I am prepared to accept that argument, but the further inference which is being drawn that if the Assembly had been elected on the basis of adult suffrage, it was then bound to possess greater wisdom and greater political knowledge is an inference which I utterly repudiate.

**Mr. Naziruddin Ahmad:** It would have been worse!

**The Hon'ble Dr. B. R. Ambedkar:** It might easily have been worse, says my Friend Mr. Naziruddin Ahmad, and I agree with him. Power and knowledge do not go together. Oftentimes they are dissociated, and I am quite frank enough to say that this House, such as it is, has probably a greater modicum and quantum of knowledge and information than the future Parliament is likely to have. I therefore submit, Sir, that the article as proposed by the Drafting Committee is the best that could be conceived in the circumstances of the case.

**Mr. President:** I shall now put the amendments to vote. I will first take up the amendments moved by Mr. Kamath in the second volume of the printed amendments. The first amendment is 3239.

**Mr. President:** The question is:

"Provided that for a period of 3 years from the commencement of this Constitution any amendment of the Constitution certified by the President to be not one of substance may be made by a Bill for the purpose being passed by both Houses of Parliament by a simple majority. This will, among other things, include any formal amendment recommended by a majority of the Judges of the Supreme Court on the ground of removing difficulties in the administration of the Constitution or for the purpose of carrying out the Constitution in public interest and certified by the President to be necessary and desirable."

The amendment was negatived.

**Mr. President:** The question is:

"That in amendment No. 118 of List III (Eighth Week), clause (a) of the proviso to the proposed article 304 be deleted."

The amendment was negatived.

**Dr. P. S. Deshmukh:** I beg to withdraw my other amendment No. 212.

The amendment was, by leave of the Assembly, withdrawn.

**Mr. President:** The question is:

"That in amendment No. 207 of List V (Eighth Week), in the proposed proviso to article 304, for the words 'Legislatures of not less than one-half of the States for the time being specified in Parts I and III of the First Schedule by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent' the word 'electorate' be substituted."

The amendment was negatived.

**Mr. President:** I think these are all the amendments. The question is:

"That proposed article 304, as amended, stand part of the Constitution."

The motion was adopted.

Article 304, as amended, was added to the Constitution.

—Vol. IX, pp. 1659-65.

## 8. ARTICLE 32 (DRAFT ARTICLE 25)

**Mr. Naziruddin Ahmad:** Sir, I move:



I first take the amendments in the order in which they have been moved. The question is:

"That in amendment No. 118 of List III (Eighth Week), for the proviso to the proposed article 304, the following proviso be substituted :—

'Provided that if such amendment seeks to make any change in—

- (a) article 43, article 44, article 60, article 142 or article 213A of this Constitution, or
- (b) Chapter IV of Part V, Chapter VIII of Part VI, or Chapter I of Part IX of this Constitution, or
- (c) any of the Lists in the Seventh Schedule, or
- (d) the representation of States in Parliament, or
- (e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States for the time being specified in Parts I and III of the First Schedule by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is passed to the President for assent'."

The amendment was adopted.

**Mr. President:** The question is:

"That in amendment No. 118 of List III (Eighth Week) for the substantive part of the proposed article 304, the following be substituted:—

'304. This Constitution may be added to or amended by, the introduction of a Bill for this purpose in either House of Parliament and passed in both Houses of Parliament by a clear majority of the total membership of each House. The provisions of the Bill shall not, however, come into force until assented to by the President'."

The amendment was negatived.

**Mr. President:** The question is:

"That in amendment No. 118 of List III (Eighth Week), in the proposed article 304, the words 'and by a majority of not less than two-thirds of the members of that House present and voting' be deleted."

The amendment was negatived.

**Mr. President:** The question is:

"That in amendment No. 118 of List III (Eighth Week), the following proviso be added to the proposed article 304:—

and I am afraid I cannot agree with the Mover of that amendment and I must oppose it.

Now, Sir, I will go into details. My Friend Mr. Tajamul Husain drew a very lurid picture by referring to various articles which are included in the Chapter dealing with Fundamental Rights. He said, there is a right to take water, there is a right to enter a shop, there is freedom to go to a bathing ghat. Now, if clause (4) came into operation, he suggested that all these elementary human rights which the Fundamental part guarantees—of permitting a man to go to a well to drink water, to walk on the road, to go to a cinema or a theatre, without any let or hindrance—will also disappear. I cannot understand from where my friend Mr. Tajamul Husain got this idea. If he had referred to article 279 which relates to the power of the President to issue a proclamation of emergency, he would have found that clause (4) which permits suspension of these rights refers only to article 13 and to no other article. The only rights that would be suspended under the proclamation issued by the President under emergency are contained in article 13; all other articles and the rights guaranteed thereunder would remain intact, none of them would be affected. Consequently, the argument which he presented to the House is entirely outside the provisions contained in article 279.

**Shri H. V. Kamath:** What about article 280?

**The Hon'ble Dr. B. R. Ambedkar:** All that it does is to suspend the remedies. I thought I would deal with that when I was dealing with the general question as to the nature of these remedies, and therefore I did not touch upon it here.

Taking up the point of Mr. Karimuddin, what he tries to do is to limit clause (4) to cases of rebellion or invasion. I thought that if he had carefully read article 275, there was really no practical difference between the provisions contained in article 275 and the amendment which he has proposed. The power to issue a proclamation of emergency vested in the President by article 275 is confined only to cases when there is war or domestic violence.

**Kazi Syed Karimuddin:** Even if war is only threatened?

**The Hon'ble Dr. B. R. Ambedkar:** Certainly. An emergency does not merely arise when war has taken place—the situation may very well be regarded as emergency when war is threatened. Consequently, if the wording of article 275 was compared with the amendment of Mr. Karimuddin, he will find that practically there is no difference in what article 275 permits the President to do and what he would be entitled to if the amendment of Mr. Karimuddin was accepted. I therefore submit, Sir, that there is no necessity for amendments Nos. 801 and 802. So far

"That in clause (2) of article 25, for the words 'in the nature of the writs of' the words 'or writs, including writs in the nature of' be substituted."

Sir, this is a red letter day in my life in this House, that this is a single amendment which is going to be accepted. This amendment is a foster-child of mine and that is why perhaps the honourable Member is going to accept it. It requires no explanation. — *Vol. VII, p. 933.*

\* \* \*

**The Hon'ble Dr. B. R. Ambedkar:** Mr. Vice-President, Sir, of the amendments that have been moved to this article I can only accept amendment No. 789 which stood in the name of Mr. Baig but which was actually moved by Mr. Naziruddin Ahmad. I accept it because it certainly improves the language of the draft. With regard to the other amendments I shall first of all take up the amendment (No. 801) moved by Mr. Tajamul Husain and the amendment (No. 802) moved by Mr. Karimuddin. Both of them are of an analogous character. The object of the amendment moved by Mr. Tajamul Husain is to delete altogether sub-clause (4) of this article and Mr. Karimuddin's amendment is to limit the language of sub-clause (4) by the introduction of the words 'in case of rebellion or invasion'.

Now, Sir, with regard to the argument that clause (4) should be deleted, I am afraid, if I may say so without any offence, that it is a very extravagant demand, a very tall order. There can be no doubt that while there are certain fundamental rights which the State must guarantee to the individual in order that the individual may have some security and freedom to develop his own personality, it is equally clear that in certain cases where, for instance, the State's very life is in jeopardy, those rights must be subject to a certain amount of limitation. Normal, peaceful times are quite different from times of emergency. In times of emergency the life of the State itself is in jeopardy and if the State is not able to protect itself in times of emergency, the individual himself will be found to have lost his very existence. Consequently, the superior right of the State to protect itself in times of emergency, so that it may survive that emergency and live to discharge its functions in order that the individual under the aegis of the State may develop, must be guaranteed as safely as the right of an individual. I know of no constitution which gave fundamental rights but which gives them in such a manner as to deprive the State in times of emergency to protect itself by curtailing the rights of the individual. You take any constitution you like, where fundamental rights are guaranteed: you will also find that provision is made for the State to suspend these in times of emergency. So far, therefore, as the amendment to delete clause (4) is concerned, it is a matter of principle

## APPENDIX IV

### EXTRACTS FROM PARLIAMENTARY DEBATES

#### ON

#### THE CONSTITUTION (FIRST AMENDMENT) BILL, 1951.\*

**The Prime Minister and Minister of External Affairs (Shri Jawaharlal Nehru):** I beg to move:—We have brought it forward now after that care, in the best form that we could give it, because we thought that the amendments mentioned in this Bill are not only necessary, but desirable, and because we thought that if these changes are not made, perhaps not only would great difficulties arise, as they have arisen in the past few months, but perhaps some of the main purposes of the very Constitution may be defeated or delayed... —(c. 8814).

Now, various types of criticisms have been raised. One of them is a rather curious one namely that this House having been elected on a narrow franchise, not being really representative of the country and of the organised will of the community, is not justified or it is not proper for it to deal with such amendments... —(c. 8815.)

In fact, it is we after all, who were the Constituent Assembly and who drafted this Constitution. Then we were not supposed to be competent enough to draft the Constitution. But now, the work we did was so perfect that we are not now competent enough to touch it. That is rather an odd argument. We have come up here, naturally because after the experience of a year and a half or so we have learned much. We have found out some, if I may say so, errors in drafting or in possible interpretations to be put on what we had drafted. That is but natural. And the House will also remember that when this matter of the Constitution was being considered in the Constituent Assembly, a clause or an article was proposed, that within a space of five years any changes in the Constitution should be relatively easy, that the normal procedure laid down need not be followed, but an easy procedure should be followed. Why? Because it was thought and if I may say so, rightly thought that after a little while many little things may come to our notice which did not come up in the course of the debate, and we could rectify them

\* P. Deb. (Parliamentary Debates,) Vol. XII, Part II, 1951, cc. 8014-9724 Bill No. 48 of 1951; introduced, Parliament (Provisional): May 12, 1951; referred to Select Committee; debated: May 12, 16, 17, 18, 23, 25, 29, 30, 31 and June 1 and 2, 1951. Motion to consider the Bill, as reported by the Select Committee was adopted on May 31, 1951 by the House divided: 216 'Ayes' and 14 'Noes.' President's assent: June 18, 1951.

as I am concerned, No. 801 is entirely against the principle which I have enunciated.

—*Vol. VII, pp. 950-51.*

### 9. ARTICLE 141 (DRAFT ARTICLE 117)

**Shri H. V. Kamath:** Mr. President, Sir, I move:

“That in article 117, for the words ‘all courts’ the words ‘all other courts’ be substituted.”

So if this is accepted, the article will read thus:

“That law declared by the Supreme Court shall be binding on all other courts within the territory of India.”

I have no doubt in my own mind that this article does not seek to bind the Supreme Court by its own judgments. What is intended by the article is, I am sure, that other courts subordinate to the Supreme Court in this land shall be bound by the judgments and the law declared by the Supreme Court from time to time. It will be unwise to bind the Supreme Court itself, because in order to ensure elasticity, in order to enable mistakes and errors to be rectified, and to leave room for growth, the Supreme Court will have to be excluded from the purview of this article. The Supreme Court may amend its own judgments, or its own interpretation of the law which it might have made on a previous occasion and rectify the errors it has committed earlier. Therefore I feel that the intention of this article would be correctly and precisely conveyed by saying that the law of the Supreme Court shall be binding on “all other courts” within the territory of India.

Sir, I move.

(Amendments Nos. 1947 and 1948 were not moved.)

**The Hon'ble Dr. B. R. Ambedkar:** Sir, there is one point which I should like to mention. It is not certainly the intention of the proposed article that the Supreme Court should be bound by its own decision like the House of Lords. The Supreme Court would be free to change its decision and take a different view from the one which it had taken before. So far as the language is concerned I am quite satisfied that the intention is carried out.

**Shri H. V. Kamath:** Then why not say “all other courts”?

**The Hon'ble Dr. B. R. Ambedkar:** “All courts” means “all other courts.”

—*Vol. VIII, p. 386*

for instance, the Constitution of the United Kingdom where Parliament is absolutely supreme and can do and say what it likes and that is the law of the land, and no court can challenge it, however they may interpret the law. Then there is the written constitution like the Constitution of that great country—the United States of America—where the Constitution to some extent, limits the authority of the legislature in so far as certain fundamental rights or other provisions are given in it. Now, in the United States of America by a long course of judicial decisions, healthy conventions have been laid down and the power of the legislature has been widened somewhat. Because of the interpretations by high judicial authority and because of those conventions, the extreme rigidity that perhaps the written word might have given it has been made more flexible in the course of generations. I have no doubt that if we live through a static period, gradually those conventions would arise here too, relaxing that extreme rigidity of the written word and that our courts would help relaxing that rigidity. But unfortunately we have no time. It is barely a little more than a year since we started functioning under this Constitution. And to begin with, therefore, it is only the written word in all its rigid aspects that apparently counts and not the many inner meanings that we sought to give to it. So we are deprived of that slow process of judicial interpretation and development of conventions which the other countries with the written constitutions have gone through like the United States of America. Therefore, because we live in these rapidly changing times, we cannot wait for that slow process. We have to give a slightly different shape to the written word. In effect we do what in the normal course judicial interpretation might have done and probably would have done and we come up before this House for that purpose.

A great deal has been said about the desire of this Government to put any kind of curb or restraint on the freedom of the citizen or Press or of groups. First of all, may I remind the House that this Bill only perhaps clears up what the authority of Parliament is. We are not putting down any kind of curb or restraint. We are removing certain doubts as to enable Parliament to function if it so chooses and when it chooses. Nothing else happens when this Bill is passed except to clarify the authority of Parliament....

— (cc. 8815-18)

The real difficulty which has come up before us is this. The Constitution lays down certain Directive Principles of State Policy and after long discussion we agreed to them and they pointed out the way we have got to travel. The Constitution also lays down certain Fundamental Rights. Both are important. The Directive Principles of State Policy represent a dynamic move towards a certain objective. The Fundamental

after that experience, with relative ease, so that after this preliminary experience, the final shape may be more final and there would be no necessity for extensive amendments. However, that particular clause unfortunately—if I may say so with due respect—was dropped out. Nevertheless, so far as this House is concerned, it can proceed in the manner provided by the Constitution to amend it, if this House so chooses.

Now, there is no doubt that this House has that authority. There is no doubt about that, and here, I am talking not of the legal or constitutional authority; but of moral authority, because it is, roughly speaking, this House that made the Constitution. We are not merely technically, the inheritors of the fathers of the Constitution. We really shaped it and hammered it after years of close debate. Now we come to this House for amendments because we have noticed some lacunae. We have noticed that difficulties arise because of various interpretations. It has been pointed out to us by judicial interpretations that some of these lacunae exist. Now, let me say right at the outset that so far as the interpretation of the Constitution is concerned, it is the right and privilege of the highest courts of the land to do it, and it is not for us as individuals or even as a Government to challenge that right. The judiciary must necessarily stand above, shall I say, political conflicts and the like, or political interpretations. They have to interpret it in the light of the law and with such light as they can give to it. We respect that and we must obey that. But having followed that interpretation, it becomes our business as Parliament to see whether the purpose we aimed at is fulfilled, because if it is not fulfilled, then the will of the community does not take effect. And if the will of the community ultimately does not take effect, then serious difficulties might arise at any time. And more so at a time like this when powerful and dynamic forces are at work, not merely in India, not merely in Asia, but all over the world, when changes take place and when we cannot think in terms of anything being static and unchanging. Therefore, while fully respecting what the courts of the land have laid down and obeying their decisions, nevertheless it becomes our duty to see whether the Constitution so interpreted was rightly framed and whether it is desirable to change it here and there so as to give effect to what really in our opinion was intended or should be intended. Therefore I come up before this House, not with a view to challenge any judicial interpretation, but rather to find out and to take the assistance of this House in clearing up doubts and in removing certain approaches to this question which have prevented us sometimes from going ahead with measures of social reform and the like.

This House knows very well that there are many kinds of constitutions in the world. There is the constitution which is not written down,

How many months, how many years did we not take to weigh every single paragraph, every single sentence and every single word of that chapter? How many changes did we make at various stages of the proceedings of the Constituent Assembly? We were criticised by the people outside the Constituent Assembly that we were taking too long a time. But many of us justified this delay because we were anxious that nothing should be done hastily or on the spur of the moment. We were doing something which was unique in the annals of this country, something indeed, to which there are not many parallels in the entire civilised world. The country had attained political freedom and within a few months of attaining it, it set itself to the task of writing a constitution and putting down everything clearly and precisely so that the people of the country belonging to all shades of opinion might have a clear idea of what exactly the country stood for. If that is so, why this indecent haste to change such a Constitution?

Changes in the Constitution have been made in other countries. I was looking at the first change or amendment made to the American Constitution, and that was within three years of its first enactment. But what were the changes for? The first amendments which were made in the American Constitution were not for curtailing freedom, not for taking away rights that had been deliberately given two and a half years ago. But every single one of those changes was made for extending the individual and the social rights of the people of the United States of America. It was a change for the advancement of the sacred policy and the principle for which the United States of America stood. And what is the said picture that we present to the country today? Within a year and a half of enacting the Constitution, we come forward and however much the Prime Minister might attempt to say that the changes are simple, that there is no controversy about it, he knows it and knows it in his heart of hearts, champion of liberty that he has been throughout his life, that what he is going to do is nothing short of cutting at the very root of the fundamental principles of the Constitution which he helped, more than anybody else, to pass only about a year and a half ago. This is the challenge which he has deliberately thrown up to the people of India. I do not know why he has thrown up this challenge. Is it due to fear? Does he feel that he is incapable today to carry on the administration of the country unless he is clothed with more and more powers to be arbitrarily utilised so that his will may be the last word on the subject? Or is it his doubt in the wisdom of the people whose champion he has been all his life? Does he feel that the people of India have run amuck and cannot be trusted with the freedom that has been given to them? What is it that he has in his mind? I was hearing the explanation that he was



Rights represent something static, to preserve certain rights. which exist. Both again are right. But somehow and sometime it might so happen that that dynamic movement and that static standstill do not quite fit into each other.

A dynamic movement towards a certain objective necessarily means certain changes taking place...that is the essence of movement. Now it may be that in the process of dynamic movement certain existing relationships are altered, varied or affected. In fact they are meant to affect those settled relationships and yet if you come back to the Fundamental Rights they are meant to preserve, not indirectly, certain settled relationships. There is a certain conflict in the two approaches, not inherently, because that was not meant, I am quite sure. But there is that slight difficulty and naturally when the courts of the land have to consider these matters they have to lay stress more on the Fundamental Rights than on the Directive Principles of State Policy. The result is that the whole purpose behind the Constitution, which was meant to be a dynamic Constitution leading to a certain goal step by step, is somewhat hampered and hindered by the static element being emphasised a little more than the dynamic element and we have to find out some way of solving it...

—(cc. 8820-21)

I have no doubt that in course of time with the help of the highest courts in the land we would develop conventions eventually which would widen the authority of the Legislature to deal with them as the United States of America has done. The unfortunate part is that we just cannot wait for a generation or two for these conventions etc. to develop. We have to deal with the situation today and tomorrow, this year and the next year. Therefore, the safest way is not to pass a legislation in a hurry but to enable Parliament to have authority to deal with such matters. Personally I confess my own belief is that it is better in any event and always for Parliament to have a large measure of authority, even the authority to make mistakes and go to pieces. Certainly I realise that in conditions as they exist in India today the exact form, let us say, of the Constitution of the United Kingdom is not applicable. We are too big a country, too varied a country. We have to have a kind of federation, autonomous States and the like. Therefore it is inevitable that we should have a written Constitution. We have got it; it is a fine Constitution. Gradually as we work it, difficulties appear. As wise men we deal with them and change it...

—(c. 8829)

**Dr. S. P. Mukherjee:** How was the Constitution framed? We spent nearly four years to frame this Constitution. It was not hurriedly done. Take this Chapter on Fundamental Rights. A special committee was appointed of which the Prime Minister himself was the Chairman.

Constitution is working properly or not. That is how it is worked in different countries.

As I was reading one of the judgments yesterday I came across significant remarks made by one of the judges of America that the greatest constitutional issue in all American history was not settled by the court, not even in the halls of the Congress, but on the battlefield of America. Freedom developed in the country not by passing laws, or by the decrees of the President, because the ultimate sanction rested with the people. We have also to reckon with the people in this country. We have drawn up the Constitution with a declared desire to protect the mighty rights and interests of the people, millions of them who are downtrodden and have not the courage to speak out. But as the Prime Minister knows, even in their hearts a new awakening has come. As we move about from place to place, we can see the signs of that reawakening, which we could not have dreamt could happen so quickly. Now let us take the fullest advantage of that reawakening in the larger interests of this country. *Let us not try to arm the executive with wider and larger powers being afraid of a Frankenstein that is supposed to have raised its head in India. There may be elements in this country with mischievous intentions. But the larger section of the population of the country is well-mannered and they are anxious that this country should go ahead peacefully. Therefore, their hearts being sound, we have to approach them in the proper way. We have to tackle the great administration in social and economic spheres specially so as to earn their spontaneous confidence...* —(cc. 8853-54.)

**Prof. N. G. Ranga:** In regard to this matter, I do think that Government as well as the hon. Prime Minister should take an early and especially through the discussions in the Select Committee to try and bring about such amendments as would help us to avoid some of the risks that my hon. friend Dr. Mookerjee has suggested to us...

Then my hon. friend talked about the mighty interests of the people. It is in the mighty interests of the people that I want this amending Bill to be accepted by this House but with suitable amendments. It is in the mighty interests of the people that I want Parliament also to be clothed with these powers, but suitably amended. At the same time I also wish to sound a note of warning in regard to the confidence that my hon. friend the Prime Minister expressed with regard to this Parliament as well as its successors. It is always possible for Parliaments to make mistakes. The British Parliament has made grievous mistakes but at the same time it had the wisdom also to rectify those mistakes and go forward. It is much better to rely upon your Parliament than to rely upon a Supreme Court. What was the experience of U.S.A.?

giving—explanation which, if I may say so, cannot stand the test of a moment's scrutiny. —(cc. 8837-39)

That can easily be done. You consult the Law Minister or the Attorney General, they will advise you. You get a quick decision by the Supreme Court. Supposing it takes a month, or two months even, if the Supreme Court comes to a certain conclusion which you consider to be fundamentally opposed to the basic principles on which the Constitution was framed then and only then would there be the right for you to ask for an amendment of the Constitution. That is the only logical, fair and equitable procedure which any Government which believes in the sanctity and sacredness of any Constitution, or any Parliament, which believes in such sacredness and sanctity would follow. But what is it you are doing? Will honourable Members read and re-read the clause as it has been proposed? What you say is that particular laws which are to be mentioned in a Schedule to the Constitution, no matter whether they infringe any provision of the Constitution or not, are deemed to be valid. Is that the way in which the Constitution should be amended? Supposing a particular Legislature passes a piece of legislation which is absolutely nonsensical. By this amendment to the Constitution you are saying that whatever legislation is passed it is deemed to be the law. Then why have your Constitution? Why have your Fundamental Rights? Who asked you to have these Fundamental Rights at all? You might have said: 'Parliament is Supreme and Parliament may from time to time pass any law in any matter it liked and that will be the law binding on the people.' You passed the Fundamental Rights deliberately and you clothed the judiciary with certain powers not for the purpose of abusing the provisions of the Constitution but for giving interpretations and generally acting in a manner which will be consistent with the welfare of the people. If the Supreme Court has gone wrong, come forward and say that the Supreme Court has come to such-and-such conclusions which are repugnant to the basic principles on which the Constitution was based. But the Supreme Court has not had a chance to consider this matter and you are coming forward with this hasty proposal that any law mentioned in the Schedule—there are a dozen of them there—would be deemed to be valid... —(cc. 8849-50)

I would just like to refer the Prime Minister to the Constitutions of England and of America. Here we have deliberately made our choice. We decided to have a written Constitution. We decided to have a Part on Fundamental Rights. Naturally when you have a Part on Fundamental Rights it obviously means that not the executive Government, not even Parliament, but the judiciary and the judiciary alone will be able to interpret and advise and decide whether the

U.S.A. has not been noted for speed. On the other hand it has always been a sort of hurdle which the American people had had to get over in order to speed on with their own progress. What was their own experience with that great chapter of social legislation that President Roosevelt had initiated, known as 'the New Deal Legislation'? Almost all that legislation was negated by the Supreme Court. Why so? Because there were men in it who were old and they could not very well understand the significance of the economic depression with which America was then faced between 1930 and 1935 and they were so old that they could not understand the dynamic forces which were propelling their own people to make their choice between Communist Party's leadership on the one side and the democratic leadership on the other side and President Roosevelt had had to wait for two or three years before it was possible for him to replace some of those old judges by younger judges who could understand the dynamics of the social forces which were confronting them. Are we to be condemned to a similar plight? Are we even in regard to these very essential matters to depend entirely upon the natural forces of the age of the Supreme Court judges so that some of those people might either die or might be obliged to retire before it would be possible for our own Government to replace them by more progressive minded Supreme Court judges? Anyhow, we have agreed upon a written Constitution. Therefore, it is absolutely essential for us to have a Supreme Court and therefore we have to be patient with the Supreme Court also.

**An Hon. Member:** They only interpret the law.

**Prof. N. G. Ranga:** We make the law and they can go on interpreting it but our law is to be interpreted in the light of this law, the law of laws and it is over this law that they are the masters because they are the only interpreters and not this Parliament and the law which Parliament might be making will be at the mercy of their interpretation. Therefore we have to safeguard ourselves from the conservatism or from the fancies or from the social matrices of these Supreme Court Judges, day to day and from time to time to the extent that it is possible.

**Shri H. V. Kamath:** That is true of all countries which have a written Constitution.

**Prof. N. G. Ranga:** That is why we should try and see that as much power as possible is vested in this Parliament in its own right, so that we can minimise the scope for the free play of the conservative forces that will be installed in power through the Supreme Court and it is in this light that I wish to support this Bill...  
—(cc. 8860-61)

**Shri Kameshawara Singh:** Although the Bill seeks to amend ten articles of the Constitution, the two important articles that are sought to

I believe, as we all do, that there are certain inviolable sacred rights that pertain to individual citizens such as the right of liberty and freedom of expression. Such rights must be guarded at all costs. But, we have to remember that wherever there are rights, there are responsibilities. If the rights are not utilised in a proper way, if they are turned into licence, then, we cannot have or protect the greatest good of the greatest number which is the basic tenet of democracy. Yesterday, when the Prime Minister spoke, he pointed out that in the United States, the Fundamental Rights in the Constitution took some time to establish themselves and that judicial findings through many decades have brought about the present position. It is very interesting reading to go through the judicial decisions on the American Constitution. But, as he very rightly pointed out, we are living in times when swift-riding changes are taking place, times which are dynamic, and we cannot go through decade after decade before we can find suitable judicial decisions which will allow of such changes that are urgently needed in the interests of the State, in conformity with the times in which we live... —(c. 8904-05)

Lastly, I want to appeal to this House that in the Preamble of our Constitution we have said that we the people of India having solemnly resolved to constitute a Sovereign Democratic Republic, to secure to all its citizens, justice, social, economic and political, is it not for us to see to it that Parliament has the power to bring in such legislation as is necessary? This is, after all, only an enabling power and if we bind through this Constitution further the power of Parliament, is it in keeping with the Preamble of the Constitution that we laid down? What will future generations think of us when they see our Preamble and see also how we have entrenched the right of vested interests as the only economic right in our Constitution whereas the other economic rights are relegated for the moment to Directive Principles which even cannot come in as long as this stands in its way? —(c. 8909)

**Shri H. V. Kamath:** I was saying that the Bill has provisions which are a curious mixture of revolution and reaction. The amendment to article 51 may be looked upon as an amendment of a revolutionary character. But the amendment to article 19, in my humble judgment, is definitely one of a reactionary nature. And the Bill therefore, I have no hesitation in saying, is a mixture of sugar and sand.

I must also say something about the way in which the Bill is being rushed through the House. Usually in many other countries an amendment of the Constitution is before the people for three or six months and people are asked to give their considered views. The forum is furnished all over the country and on the platform and in the press it is debated.

tution, Government should have taken care to supply us with full information on every point, to tell us exactly why each particular amendment was needed... —(c. 8896)

If the amendments proposed are accepted then it is not merely that article 19 will be amended, but that, for all practical purposes part (a) of clause (1) of article 19 will be deleted. The provision relating to freedom of speech and expression will be reduced to the position that Fundamental Rights occupy in the continental Constitutions. In those Constitutions, Fundamental Rights are no more than pious wishes. At the best, they are indications of the policy of the authorities; nothing more than that. I, therefore, think that if Government really feel that the clause to which I have referred must be hedged round with such serious limitations as to make it valueless for all practical purposes then they should courageously come forward and ask for the deletion of that clause .. —(c. 8898)

Let me guard myself once more against any misunderstanding. There can be no re-opening of the questions which were at issue when the Constituent Assembly discussed the Constitution. Those questions have been laid to rest. Article 31 has to be given effect to. The rights of the community have to be given precedence over the rights of individual. But, the Prime Minister sought to reconcile the one with the other so that there may be not only progress, but also stability. In view of this, I support the view of those hon. Members who think that the Bill should be circulated even though it may be for a short time, for a fortnight, in order to enable the public to express its opinion. It is not the same thing as the consideration of the matter by the Supreme Court. But, it will enable us to consider the measure more fully than it could be done at the present time. —(c. 8903-04)

**Shrimati Renuka Ray** (West Bengal): I am very glad that this Bill which seeks to make certain changes in the Constitution we drew up a year and a half ago, is being sent to a Select Committee for careful consideration and scrutiny. Even when we were in the midst of passing the Constitution, we realised that in the light of experience, certain amendments would become necessary. There were many of us who felt and who expressed the view that the Constitution we were drawing up was of a very voluminous nature, and that in our zeal, and a righteous zeal to see that the executive Government should not wield too much power and that this Constitution of our Sovereign Republic should not become a pawn of dictatorship either of the right or of the left, we forgot that we were in the meantime circumscribing in many ways the powers of the sovereign Parliament, which expresses the will of the people and which is the very basis of the democratic system.

I am reminded in this connection of a suggestion by some Members in the *Constituent Assembly* that we should in the *Constitution* itself lay down that no amendment will be made for a certain period. That suggestion, of course, did not find favour with the Members of the *Constituent Assembly*. But, one does feel now that there was some point in it and that if we had made some provision at least for eliciting public opinion upon amendments, we should not today be faced with an amendment which, on all accounts, is being rushed through. An important Bill which we were considering has been postponed. This Bill is being referred to a Select Committee with the direction to report to the House within a few days. The powers sought in the Bill for Parliament are not, it is said, for using presently, but just to enable Parliament to pass certain legislation if needed. But, I submit that the attempt to rush through this measure is not the proper attitude which we should adopt, in any case, that this House should adopt. Perhaps, Government may feel the necessity for it; but this House has to consider it ultimately and we think we should not at least create this precedent of amending the *Constitution* in such a way. At present, we are not only responsible for passing legislations and the present Government is responsible not only for the governance of the country, but it devolves upon us as Members of this House to create good conventions and good precedents. And might I not ask my hon. friends here to consider whether we are in this way really laying down good precedents for amending the *Constitution*? It is another matter whether the amendment that we are effecting is useful or not. But certainly we are not laying down healthy conventions for taking up amendments to the *Constitution*. It devolves upon this House being the first to take up amendments, to lay down such procedure as may be followed by posterity in the matter of amending the *Constitution* and maintaining its sanctity and solemnity which it fully deserves...

—(cc. 8924-5)

Analysing the different amendments to the *Constitution* we find that there are other difficulties also. It is proposed for example in this amending Bill that laws which might have been declared *ultra vires* by judicial pronouncements will all be validated. This again is not the correct procedure to adopt in the matter of legislation and particularly constitutional legislation. The right procedure should have been to amend the articles which are directly concerned and then to leave the appellate court to reconsider the point and then give a judgment that the particular law is *intra vires* in view of the amendments made to the law concerned. In fact, I do not think I am far from wrong when I say that there is hardly one Member in the House who has read all the eleven Bills which we propose to validate under this amending Bill which is serious responsibility that the House is taking upon itself. The best

But here this Bill was introduced last week, hardly taken up for consideration this week, hardly two or three days are given to the Select Committee and the Bill is being brought back to the House for final consideration and passing next week. I can only say that this action of rushing this amending measure, important as it is, is midsummer madness. I cannot find any other words to describe such a procedure. It is nothing short of midsummer madness. What I mean is that we must be given some more time and that is the least that can be done... —(cc. 8912-13)

As regards the other amendments contemplated to article 19, that is to say, with regard to friendly relations with foreign States, public order, incitement to offence, there is no basis or ground quoted in the Statement of Objects and Reasons as to why this amendment is being brought forward as regards these three matters. As regards public order, Dr. Ambedkar may recall the debate that took place in the Constituent Assembly on the 17th October, 1949. My friend, Mr. T. T. Krishnamachari, who is not here now, on the 16th October, 1949 brought this amendment to article 13 (then 13, now 19) seeking to include "public order" within the purview of that article. Then, when it was about to be moved, Mr. Krishnamachari got up on behalf of the Drafting Committee—he was a member of the Drafting Committee in those days—and suggested it be held over. On the next day he gave a statement that after prolonged deliberation they have thought it fit to delete the words "public order" from the amendment suggested earlier. That was the official view, and one endorsed by the Constituent Assembly. Now, within barely a year and a half after that date, just fifteen months after the inauguration of the Constitution, this clause is again sought to be included in this amendment to article 19. I fail to see how or in what way the existing statutes have been found inadequate to deal with offences relating to public order. I am sure there are enough laws and Acts in the armoury of Government for all such offences against public order, and that amendment therefore read with this other one relating to incitement to an offence makes very dangerous reading indeed... —(cc. 8914-15)

**Shri Shyamnandan Sahay:** The first impression that I got when I read the proposed amendments was that our Constitution is really being reduced to the position of an ordinary legislation. A constitution is not meant for one Government or the other. It is meant to cover the needs of the country as a whole; it is meant to foresee even the future up to a point and lay down such rules that may be suitable for the country at large for some time to come. Even the best admirers of this Constitution when it was framed did not claim infallibility for it and did not say that it was the last word. But, even its worst critics did not apprehend or anticipate that the sponsors would be coming up so soon to amend it.



this democracy? Is this constitutionalism? My hon. colleague Mr. Kala Venkatarao referred to the fact that he had read the Bihar Act. I am glad that he has done so. I should invite the attention of the House to the fact that here are the two Acts of the two adjacent provinces, the U.P. Act and the Bihar Act. The U.P. Act contains 343 sections and six schedules in this size of a book. Here is the Bihar Act which contains only 43 sections.

**Dr. P. R. Deshmukh:** Short and sweet.

**Shri M. P. Mishra:** It could have been done in five pages.

**Shri Kala Venkatarao:** The Madras Act has about 60 sections and the zamindaris have already been notified and may have been taken over.

**Shri Hussain Imam:** Let me proceed. The Bihar Act is called the Land Reform Act; it does not mention a word about the abolition of zamindari because that Government was advised by its legal advisers that by bringing in those words, it will have to undergo certain fundamental checks. Therefore they have called it the Land Reform Act, and left out the words 'abolition of zamindari'. But it contains not a single section about the reform of the land laws. If Mr. Kala Venkatarao will show me a single section on the subject I shall be grateful...—(cc. 8958-60)

**Pandit Krishna Chandra Sharma:** This is a very important Bill which deals with amending the Fundamental Rights. I want to disabuse the mind of the hon. Member who made so much of the fundamental rights. It is one thing to have formal recognition of the fundamental rights either in the Constitution or in any set of laws but it is quite another thing to have them effectively recognised in the day to day life of people. *No Constitution nor law can give any rights if public opinion is not willing and ready to uphold them.* The law of a country can only come into force in accordance with the social, economic and political conditions of the community, the intellectual capacity of its people and their moral receptivity. Do you think that a degraded and down-trodden people will ever be willing to uphold the zamindari system? I am sorry my hon. friend is not here. He talked of the sand's heat *being greater than the heat of the sun.* The sun has been reduced to sand. For hundreds of years you have been reaping where you had not sown. You have degraded the people, you have trampled upon them, the people who laboured for you and still you say that you want light from the sun. Where is that damned sun? Where does it exist? You want the man who labours for you to remain silent for ever. That is an impossibility. I want to disabuse the mind of hon. Members of the

course and the course which has been followed in the past is that if a certain law has been declared as ultra vires on the basis of interpretation of certain sections, then those sections are amended and then the matter is to be left to the appellate authority to decide that the impugned Act has become fully legalised. The procedure adopted in the Constitution Amendment Bill, in my opinion, proceeds on a dangerous principle and the House will do well to consider carefully whether we should accept this principle of validating a whole Act or not, by means of an amending Bill ..

—(cc. 8937-8)

**Shri Hussain Imam:** The whole trouble arises from one concept. Here we started to frame a Constitution under the aegis of the British and immediately after the removal of the British suzerainty. We were obsessed by the British model which had no written Constitution and where the supremacy of Parliament was undisputed. In all the written Constitutions, the Parliament is not a fully sovereign body; it is subject to the limits laid down by the Constitution. As far as the Constitution is concerned, it is regarded as superior to other Constitutions, notably that of the U.S.A., you have got stringent measures by means of which it is not only that an absolute majority of the two Houses, the House of Representatives and the Senate must vote—a two-thirds majority—but two-thirds of the States also must ratify the amendment. It is only when the 36th State ratifies the amendment that the amendment takes place. We have not got that provision. The reason is plain and simple. In other countries, notably U.S.A. and Ireland, the revolutionary fervour was there. People had attained independence through revolution and they were eager to preserve the rights and interests of the people. A Constituent Assembly had never functioned as a legislature also. By combining them and giving the dual function to the Constituent Assembly, we made the task of the Constituent Assembly well nigh impossible. It could not preserve the rights of the people and at the same time give power to the Government. It had, therefore, to devise ways and means through which it could give something to the one and at the same time give power to the other. An hon. colleague of mine, Mr. Anthony, aptly described this Chapter as a Chapter of denial of fundamental rights, because the fundamental rights that have been given in this Chapter have been hedged in by so many safeguards. Notably in articles 19 and 31, the safeguards far exceed the positive rights that are given. The question which arises, and which I wish to put plainly and squarely before the Government is whether a justiciable right could be made non-justiciable. This is exactly what we are doing. Article 31 is included in the list of justiciable rights; by means of this amendment, what are we doing? We are excluding all the jurisdiction of the courts? Is this correct? Is

impression that because certain rights are given in the Constitution or any set of laws, therefore they are sacrosanct and therefore you can effectively count upon them. That is not the way of the world. The people are greater than any set of laws or anything in the Constitution...

—(cc. 8991-2)

**Dr. B. R. Ambedkar:** It is next important to consider why the Supreme Court and the various State High Courts have come to this conclusion. Why is it that they say that Parliament has no right to make a law in the interests of public order or in the interests of preventing incitement to offences? That is a very very important question and it is a question about which I am personally considerably disturbed. For this purpose I must refer briefly to the rules of construction which have been adopted by the Supreme Court as well as by the various State High Courts; but before I go to that I would like to refer very briefly to the rules of construction which have been adopted by the Supreme Court of the United States—and I think it is very relevant because the House will remember that if there is any Constitution in the world of a country of any importance which contains fundamental rights, it is the Constitution of the United States, and those of us who were entrusted with the task of framing our own Constitution had incessantly to refer to the Constitution of the United States in framing our own fundamental rights. There are many Members, I know, who are familiar with the Constitution of the United States. How does the Constitution of the United States read? I think hon. Members will realise that apparently there is one difference between the Constitution of India and the Constitution of the United States so far as the fundamental rights are concerned. The fundamental rights in the Constitution of the United States are stated in an absolute form; the Constitution does not lay down any limitation on the fundamental rights but it also enumerates the limitations on the fundamental rights, and yet what is the result? It is an important question to consider. The result is this, that the fundamental rights in the United States, although in the text of the Constitution they appear as absolute, so far as judicial interpretations are concerned they are riddled with limitations of one sort or another. Nobody can in the United States claim that his fundamental rights are absolute and that the Congress has no power to limit them or to regulate them. In our country I find that we are in the midst of a paradox: we have fundamental rights, we have limitations imposed upon them, and yet the Supreme Court and the High Courts say, "You shall not have any further limitations upon the fundamental rights."

Now comes the question, how does this result come to be? And here I come to the canons of interpretation which have been adopted in

this stage, are ill-advised, and ill-timed. I would not go into the merits of the amendments themselves. But, is this the time to bring forward such far reaching amendments? I listened with rapt attention and with the respect which he deserves and commends, to the speech of the hon. Law Minister. I have known him at work at close quarters and I know he can argue a case, no matter how bad it is. He was in this case arguing against his own former brief. When he pleaded for the incorporation of fundamental rights he brought forward all kinds of arguments justifying them. He had no manner of doubt at that time that these benefits which have been conferred on the citizens of future India will not work; he was absolutely certain. The Constitution of India was founded on those fundamental rights. They became our charter of liberty. Now, in 15 months' time, it is proposed to abrogate them, a word which was used by my hon. friend Pandit Kunzru. At all events, it is now intended to seriously restrict the fundamental rights which were conferred by the Constitution.

Our Constitution, I remember—I was abroad at that time—was praised by all the nations of the world because of these fundamental rights. They thought that India had made a great advance and the Constitution that it had framed would be an object-lesson to the rest of the world. I ask you, Madam, what would be the impression created in the minds of these foreign nations? They would say that we are never consistent and that there is no stability in this country. I ask you whether it is worthwhile creating that impression at this stage. What is the benefit which it is going to bring?

I will not enter into the rights or wrongs of the many things which these amendments seek to remedy. Supposing zamindari is not abolished for six months or one year more, will the heavens come down? Will the skies fall to the earth? I do not believe that, zamindari has gone on all these years. I do not believe that it is such an essential measure of agrarian reform. It may be necessary; but there are many more things which could be done today without altering the Constitution.

**Shrimati Renuka Ray:** You are lucky to have been untouched yourselves.

**Dr. P. R. Deshmukh:** Bank balances?

**Shrimati Renuka Ray:** I mean the capitalists.

**Shri J. P. Srivastava:** I know the charming lady. I listened to her speech with great respect and I hope she will extend the same respect to me.

The point is whether when we have so many problems on our hands, this is the right time to raise this controversy. It is argued that this

Sastri. He has said that they will not enlarge it and therefore, as the Constitution itself does not authorize Parliament to make a law for purposes of public order, according to them Parliament has no capacity to do it and they will not invest Parliament with any such authority. In the case of the Press Emergency Laws also they have said the same thing that in clause (2) there is no head permitting Parliament to make any limitations in the interests of preventing incitement to an offence. Since section 4 of the Press (Emergency Powers) Act provides for punishment for incitement to the commitment of any offence, Parliament has no authority to do it. That is the general line of argument which the Supreme Court judges have adopted in interpreting the Constitution.

With regard to the doctrine of implied powers, they have also more or less taken the same view. Personally myself, I take the view that there is ample scope for recognising the doctrine of implied powers, and I think our Directive Principles are nothing else than a series of provisions which contain implicitly in them the doctrine of implied powers. I find that these Directive Principles are made a matter of fun both by judges and by lawyers appearing before them. Article 37 of the Directive Principles has been made a butt of ridicule. Article 37 says that these Directives are *not justiciable*, that *no one would be entitled to file a suit against the Government for the purpose of what we call specific performance*. I admit that it is so. But I respectfully submit that that is not the way of disposing of the Directive Principles. What are the Directive Principles? The Directive Principles are nothing but obligations imposed by the Constitution upon the various Governments in this country—that they shall do certain things, although it says that if they fail to do them, *no one will have the right to call for specific performance*. But the fact that there are obligations of the Government, I think, stands unimpeached. My submission is this: that if these are the obligations of the State, how can the State discharge these obligations unless it undertakes legislation to give effect to them? And if the statement of obligations necessitates the imposition and enactment of laws, it is obvious that all these *fundamental principles of Directive Policy* imply that the State with regard to the matters mentioned in these Directive Principles has the implied power to make a law. Therefore, my contention is this, that so far as the doctrine of implied powers is concerned, there is ample authority in the Constitution itself to permit Parliament to make legislation, although it will not be specifically covered by the provisions contained in the Part on Fundamental Rights...

—(cc. 9011-14)

**Shri J. P. Srivastava** (Uttar Pradesh): At the outset, I would say that my feeling is that these amendments to the Constitution, at

After all nearly all the Members who are present here in this House were framers of this Constitution and they will remember the long debates we had about various matters. We spent many months over this. That does not mean, of course, that everything that we did was perfect. No doubt we shall learn by experience and try to remedy. But the fact remains that we have good, general broad idea of what we intended. So, my first point, if I may make it, is this: that in the principal amendments that we seek to put forward, there is not an attempt at real change of the Constitution. We have only sought to bring out what is implicit and what we knew should be there and what everybody, I think, if he considers it carefully and dispassionately must recognise should be there.

—(a. 9073-4).

**Dr. S. P. Mukerjee** (West Bengal): There is no difference of opinion on one point, that the Constitution framed by us two years ago is not the last word on the subject. The Prime Minister tried to develop this point as if somebody had suggested that under no circumstance the Constitution can or should be amended. As has been said by a great American leader "a Constitution worth its name is not written in ink but in letters of living light". It must respond to the spirit of the people. Otherwise, that Constitution is rigid and is dead. Here is the question of amending a Constitution which we solemnly passed. If you look at the preamble, you will see that it was not a particular political party that passed the Constitution. We took upon ourselves the enormous privilege of describing ourselves as the people of India who met, sat and discussed for months and years and then gave a Constitution to the country.

I have talked to many Members in private and they have told me: Why are you opposing the move to give Parliament more powers? After all it is only an enabling power that you are handing over to your Parliament and why should there be any opposition to such a move? I recognize the sincerity of such a question but let me ask you in all seriousness: Have you not dealt with this question finally at least when you decided otherwise, when you framed your own written Constitution? The Prime Minister spoke yesterday of the greatness of the flexible Constitution of Great Britain. Undoubtedly Great Britain has no written Constitution but we deliberately decided that we will have a written Constitution. That was not forced upon us. It was your own decision, I would submit, wisely taken and rightly taken because in a country such as ours and especially in the formative period after the attainment of freedom we cannot possibly leave anything to doubt. We have to decide vital matters concerning the rights and liberties of the people and embody them in a sacred Constitution. That is what we did. When we decided to have a written Constitution, we also decided to have a Chapter dealing

consider this measure and I do affirm with full faith that far from changing this Constitution these amendments give full effect to the Constitution as we wanted it to be. I say that with full faith. It was implicit in the Constitution when we discussed it again and again in the Constituent Assembly, and, indeed it is implicit in every such Constitution and has to be implicit, if the State is to endure.

Remember also that this measure has nothing to do with making any fresh law. That is for Parliament to do, this Parliament or some other that may succeed it. So to talk about the executive grabbing powers is completely outside the mark. It may be, of course, that Parliament decides this or that at some future date. Whatever it may decide it will have to decide naturally in terms of the Constitution... —(cc. 9070-1)

Normally speaking, in constitutions, that is where there are no written constitutions, where there are no fundamental rights, they naturally grow up by the Common Law or sometimes by enactment of Parliaments and the like. Where there are written constitutions, they have grown up by judicial interpretations. Take this great Constitution of the United States of America. In its beginning what was it? It was only an adaptation of the colonial Constitution. Naturally because they had been functioning under a colonial Constitution framed by the British power in America. It was an adaptation of it; it was based on it, as ours has been based on the Government of India Act, 1935. In spite of our freedom and independence, the extent to which the provisions of the 1935 Act have come into our Constitution is extraordinary. So the United States Constitution was based on the colonial Constitution. It is not that later a new Constitution was made by the United States. Possibly, probably, it would have been rather different. However, they did the other thing, and that is they stuck to that Constitution, but by process of judicial interpretation, they brought in what was implied in the existence of the Constitution. They had many tussles about. But in the course of the last one-hundred and fifty years or more, gradually they built up those conventions and interpretations and those things which were implicit were made explicit.

Our difficulty here has been, frankly speaking, that something that we considered as absolutely implicit in the Constitution, something that was obvious, if looked at from the strictly narrow legalistic, literal meaning of the words is not implicit. Though obviously a thing is implicit, legalistically it may not be there—if you look at it in a legalistic way, as sometimes judges tend to, unless they take the broader view, then immediately you narrow the scope of Constitution, you limit the very ideas that the framers of the Constitution had.

**Dr. P. R. Deshmuk** (Madhya Pradesh): America and not India.

**Dr. S. P. Mukerjee:** They were not persons who were just political demagogues. They were not persons who just wanted to play with emotions. We also have made a similar decision. Our complaint is that having provided for fundamental rights yourselves you are changing them today in an arbitrary and high-handed fashion....  
—(cc. 9694-97)

**Acharya Kriplani** (Uttar Pradesh): It appears that it is superfluous to speak at this stage. Government seem to have made up their mind and they have a solid majority behind them, and whatever is proposed will be carried out. Sometimes it becomes one's duty to raise a voice of protest when things that we never imagined before are done. I can understand that there be constitutional changes. Nothing in the world is stationary; nothing can be stationary; but where a law is changed, much more so when the basis of a law is changed in a democracy people must be consulted. There was one thing about which we have been educating the public for years and to which we were pledged. Everybody knew our minds about the abolition of zamindari. In this enough propaganda has been carried on and public opinion was in our favour. So if only an amendment had been brought to the effect that nothing in the Constitution should debar the Legislature from abolishing the zamindari system, I would have understood it. We were pledged to that but along with it has been brought something against which we were pledged. We were pledged to *freedom of speech and freedom of expression*... We were pledged against their abrogation. The deprivation of the freedom of speech and expression had been our greatest handicap in our struggle for freedom. We struggled against it and we have suffered in order to assert the right of freedom of speech and freedom of expression. Putting those two things together is really a sort of strange jugglery which only the present Government is capable of....  
—(c. 9721-22)

We have heard much about fundamental rights. The Prime Minister talked of the French revolution and the American revolution when this idea of fundamental rights arose. I was the Chairman of the Fundamental Rights Committee. As we sat, I told my colleagues that there was no such things as fundamental rights nowadays and that every right is so hedged in that it disappears. Yet, the Government wanted to make itself respectable. It is considered respectable to have these fundamental rights in your Constitution. England has no fundamental rights. It goes on quite well enough. But if you have fundamental rights you must make them respectable and constitutionally scientific. The report that we gave was not accepted. Other Committees were appointed to water down these fundamental rights till we came to the



with fundamental rights. Many Members will recall that at that time this question was discussed: Was it necessary to have a Chapter dealing with fundamental rights? You might not have got such a Chapter; but you decided to have that Chapter. As soon as you made that decision, along with it came the decision that you were deliberately curbing the powers of your Parliament. There is no escaping from this position. If you want to say today that a written constitution is not good for India and that there should be no Chapter on fundamental rights, be logical and proceed accordingly. But, once you have a Chapter on fundamental rights, then, along with it proceed certain conclusions, namely, that you are deliberately curbing the powers of your Parliament.

Here, I shall read out only two quotations because I cannot speak in the same clear and precise language as Mr. William Taft observed in America while speaking on this very question:

"No honest, clear-headed man, however great a lover of popular Government, can deny that the unbridled expression of the majority of a community, converted into law or action would sometimes make a Government tyrannical or cruel. Constitutions are checks upon the hasty action of the majority. They are the self-imposed restraints of a whole people upon a majority of them to secure sober action and a respect for the rights of the minority and others. In order to maintain the rights of the minority and the individual, and to preserve our constitutional balance we must have judges with courage to decide against the minority, when justice and law require."

And this point was very clearly set out by another person, who was not a politician, but who was a Justice of the Supreme Court of America, in very telling words:

"The very purpose of a Bill of Rights (such as is embodied in the fundamental rights) was to withdraw certain subjects from the arena of political controversy, to place them beyond the reach of majorities and officials, to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech and a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

This point was again stressed very succinctly:

"There is a limit to your power.

Thus far and no further.

And here shall thy proud waves be stayed."

These observations, I do not wish to multiply them, were made by persons who were also responsible for the administration of their country.

## APPENDIX V

### EXTRACTS FROM THE CONSTITUTIONS OF SELECT COUNTRIES AND NOTES ON THEIR PROCESS OF AMENDMENTS AND THE POSITION OF FUNDAMENTAL RIGHTS THEREIN

#### 1. Commonwealth of Australia

##### CONSTITUTION ACT (1900)†

##### *Chapter VIII—Alteration of the Constitution*

**Mode of altering the Constitution** 128. This Constitution shall not be altered except in the following manner:

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

† Text of the Constitution supplied by the Australian High Commission, New Delhi.

minimum that could be allowed as fundamental rights. Having done that, you want again to tamper with them. I can understand and I would be one with the Government and I will vote with the Government if they say, that there is no need for fundamental rights. It is an old and antiquated 19th century idea which took its rise from what are called natural rights. We have no more any need for natural rights and we should attach no value to the idea of fundamental rights. If you want to keep an antiquated thing to make yourselves respectable, keep it in a proper way; do not tamper with it as you are trying to do now.

Then, the Prime Minister waxed eloquent—I am sorry he is not present. He has a way of doing things which is peculiarly his own. He uses eloquence, passion, sentiment, reason, threats, and bullying (interruption).

**Several Hon. Members:** Question.

**Several Hon. Members:** No.

**Acharya Kriplani:** All these things were combined together in his speech yesterday. He told us that there was no sanctity attaching to the Constitution. Let us analyse who gave this sanctity to the Constitution. It is the Government itself. They made it into a special document.

**Shri Joachim Alva (Bombay):** Madam, may I interrupt the hon. speaker and ask whether the phrase 'bullying' is correct and parliamentary and that in relation to the Leader of the House?

**Several Hon. Members:** No, no.

**Mr. Chairman:** I do not think it is unparliamentary.

**An Hon. Member:** Perhaps the hon. Member is not happy.

**Acharya Kriplani:** I was not at all happy; we are all not very happy. If 'bullying' offends anybody, I withdraw it. Will it satisfy? Will it make it less the bullying?

We were told that we should consider the Constitution as sacrosanct and we thought that it must not be tampered. But, how did this Constitution come to occupy such a sacred place? It is the Government that wanted to give it this sacredness. What did they do? They put it in a volume. The volume was illuminated. Everyone of us had to sign it. Then, the President of the Republic swears that he will keep the Constitution. Every Minister swears that he will keep the Constitution. But if they change the Constitution so easily and so quickly I do not know what they have sworn to. It is absurd to swear by something which you can change the next day.

—(cc.9724-25)

2. *Constitution of Belgium, 1831*†*Heading III*

## CONCERNING POWER

25. All power stem from the nation.

They shall be exercised in the manner established by the Constitution.

28. The authoritative interpretation of laws is solely the prerogative of the legislative authority.

*Chapter II—Concerning the King and his Ministers.*

71. The King has the right to dissolve the Houses either simultaneously or separately. The act of dissolution comprises a notice summoning the electorate to vote within forty days, and the Houses to meet again within two months.

84. No alteration to the Constitution may be made during a regency.

*Heading VI*

## GENERAL CLAUSES

130. The Constitution may not be suspended, either in whole or in part.

*Heading VIII*

## THE REVISION OF THE CONSTITUTION

131. The legislative power has the right to state that it is necessary to revise this or that constitutional clause as it shall designate.

Following this statement both Houses are automatically dissolved.

Two new Houses will be convened, in accordance with Article 71.

These Houses, in agreement with the King, shall pronounce judgment on the points submitted for revision.

In this case the Houses shall not debate unless at least two-thirds of the members of each of them are present; and no alteration shall be adopted unless it secures at least two-thirds of the total votes cast.

## NOTE

No article of the Constitution may escape amendment but a complete en bloc revision as such is precluded because for the amendment of each article or part thereof a separate statement of intent is required.

† Text of the Constitution supplied by the Belgian Embassy, New Delhi.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

## NOTE

Over thirty amendments have been submitted to referendum out of which only four were adopted ; and two of these were trivial.<sup>1</sup> None of these amendments affected the rights of the citizens.

The Constitution has conferred a limited original jurisdiction on the High Court<sup>2</sup> and has left to the Parliament to confer original jurisdiction in any matter, *inter alia*, arising under the Constitution or involving its interpretation.<sup>3</sup> An appeal to the Privy Council from the decision of the High Court upon questions affecting the limits of powers between the Commonwealth of Australia and the States is prohibited by the Constitution unless the High Court certifies that they ought to be determined by the Council. In practice the High Court has become the final authority on these questions.

1. The Constitution Alteration (Senate Elections) 1906 altered Section 13 ; the Constitution (State Debts) 1909 altered Section 105 permitting Parliament to take over from the States their public debts anytime not confining to those existing at the establishment of the Constitution ; The Constitution Alteration (State Debts) 1928 added Section 105A enabling Parliament to enter into agreements with the States with respect to the public debts of the States ; and The Constitution Alteration (Social Services) 1946 added clause XXIIIA to Section 51 conferring legislative power on the Parliament relating to health and social services like maternity allowance, widows' pensions, unemployment and social security.
2. In matters arising out of treaty, diplomatic representatives, in which the Commonwealth or the States of residents of different States are the parties and in which writ of mandamus or prohibition or injunction is sought against the offices of the Commonwealth.
3. The Parliament has passed the Judiciary Act, 1903-1950 conferring jurisdiction on the High Court in respect of all the matters arising under the Constitution or involving its interpretation, and in trials of indictable offences against Federal laws.

all contestations except those provided by the law, both the Houses of Parliament have the sovereign right to judge the constitutional worth of their own enactments because article 28 states that the authoritative interpretation of laws is solely the prerogative of the legislative authority.

The two statements of intent to revise certain articles of the Constitution mainly relating to Belgium's participation in the organisation and functioning of supranational institutions were made in 1953 and in 1957 but did not end up in actual amendments. With a view to adapt the Constitution to developments in the life of the Nation<sup>3</sup> to contemporary international realities<sup>4</sup>, to confer additional civil, social and economic rights on the citizens<sup>5</sup> and to solve the cultural problems of the nation<sup>6</sup>, third statement of intent to revise certain articles of the Constitution has been made by both Houses and by the King in 1965 and is pending consideration of the newly elected Houses.

### 3. The Constitution of the Union of Burma, 1947†

#### *Chapter I—Form of State*

#### 3. The sovereignty of the Union resides in the people.

3. Deletion of cl. 4 of article 1 which has become obsolete because of the ceding of colonial possession;  
amending article 126 relating to the status of capital;  
inserting article 140 to say that the Constitution drawn in French and Dutch is a valid text; and deleting certain transitional articles.
4. Inserting article 25 (b) to provide for attributing certain powers to supranational organisations;  
amending article 84 to enable revision of the articles which do not affect the prerogatives of the Crown during the regency;  
inserting article 107 (b) to make non-applicable certain clauses of internal laws that run counter to international law or to the community law governing supranational institutions;  
inserting article 131 (b) to ban constitutional revision in war time or when the Houses are prevented from convening freely on the national territory.
5. Amending article 6 to clarify that its prohibition extends not only against discrimination based on sex but also that of other forms such as race, religion etc;  
amending article 22 for the purpose of "better guarantees regarding the secrecy of communications which citizens exchange among themselves", and inserting clauses guaranteeing economic and social rights.
6. Inserting clauses for creating cultural councils one each for French speaking community and Dutch speaking community for safeguarding their certain interests and empowering them to lay proposals therefor before the Government or the Houses of Parliament.

Text of the Constitution as given in Maung Maung: *'Burma's Constitution'*, 1956.

† The Revolutionary Council formed as a result of the Military Coup of March 2, 1962 dissolved both the Chambers of the Union Parliament on March 3, and the Election Commission and All Parties Government Advisory Committee on March 8 and vested in General Ne Win full legislative, judicial and executive powers but made all laws continue until repealed or amended.

The revision procedure comprises three separate and distinct stages: (1) the Pre-revision procedure: the initiative is taken and the statement of intent to revise is made in Parliament; (2) Parliament is dissolved and all its members are re-elected; and (3) work then begins on the revision itself. The right to initiate revision is vested in the legislative authority: the King, the House of Representatives and the Senate. The revision is proposed in the usual form of a Bill or a draft amendment to the text or a Royal Decree. For all purposes the procedure is the same as for ordinary legislative matters and no special majority is required.

The new Houses, elected as a result of the decision to dissolve the previous Houses, are said to be Constituent Assemblies having the powers coinciding with that of their term of office. It may either revise or reject the revision of only the articles which were subject of statement of intent. Its powers are unfettered as to the manner and extent of revision. The resolutions covering the revision of articles when passed by both the Houses, are submitted for the approval of the King who may withhold approval if he wishes but there is no precedent to show that he has refused such an approval any time.

While Belgium has evidenced considerable developments in the political, social and economic spheres since 1831, the Constitution itself has remained virtually unchanged except on two occasions in 1893<sup>1</sup> and 1920<sup>2</sup> when it was revised without affecting the constitutional system or modifying the constitutional principles. This is attributed to the two features of the Constitution. Firstly, the Constitution is conceived in very broad terms which enables extremely flexible interpretation being given to the constitutional regulations; and secondly, even though the Constitution has conferred the civil rights and political rights on the citizens, some in absolute terms (articles 12, 13, 14, 15, 16 (1), 17 (i), 18, 20, 21, 24) and others under certain conditions and subject to regulations by law, and conferred exclusive jurisdictions on the law courts in respect of contestations arising out of civil rights, and in respect of political rights

1. 1893-revision amended Articles relating to the succession to the throne, grouping of provinces and disqualifications to be a member of either House of Parliament exempting Ministers from being disqualified on the ground of accepting salaried post under the government.
2. 1920-revision substituted articles relating to electoral constituencies and making eligible a legally resident Belgian, etc. to be a member of either House of Parliament

1921-revision substituted articles, withdrawing lower House's privilege to introduce certain kinds of financial Bill and conferring it on other bodies of the legislature as well. House of the People, Senate and the King; introduced universal adult franchise, and provided for additional amenities to the members of the Legislatures.

the members present and voting, representing the State or each of the States concerned, as the case may be, have voted in its favour.

- (5) A Bill which seeks to abridge any special rights conferred by this Constitution on Karens or Chins,<sup>3</sup> shall not be deemed to have been passed by the Chambers in joint sitting unless a majority of the members present and voting, representing the Karens or the Chins,<sup>3</sup> as the case may be, have voted it in its favour.

210. Upon the Bill being passed in accordance with the foregoing provisions of this Chapter, it shall be presented to the President who shall forthwith sign and promulgate the same.

### NOTE

The Constitution has conferred fundamental rights on the citizens as well as other persons and guaranteed the right to move the Supreme Court for their enforcement. In addition to providing for the Directive Principles of State Policy for the general guidance of the State it contains a chapter dealing with the relations of the State to peasants and workers providing that the State is the ultimate owner of all lands, subject to the Constitution the State has right to regulate, alter or abolish land tenures etc., and that the State may assist workers in organising against economic exploitations and protect workers by legislations as to right of associations, working conditions and social welfare. Of the fundamental rights some are expressed in absolute terms (Sections 13, 14, 15, 19 (i), 22, 24 and 26), some are subject to law (Section 11 read with Section 12, and Sections 16, 17, 18, 23 (4) & (5) and 28), and others subject to restrictions on the specified grounds (Sections 19 (ii), 20, 21, 23 (i) (2) and (3), 25 and 27.)

The Constitution was amended in 1951, 1959 and 1961 (twice) but none of the amendments dealt with the fundamental rights. The Act of 1951 dealt with the establishment of a separate State called 'Karen' and related provisions for its special status within the Union amending Sections 180, 181, deleting Section 83 (1) and expression 'Karen or' in Section 209 (5) and substituting clause (e) and words 'fifty three seats' by 'Sixty two seats' in clause (f) of the Second Schedule. The Act of 1959 suspended Section 116 with a view to enable a Minister who is not a member of the Parliament to continue for a period more than six months; and repealed certain clauses dealing with the special status of certain States. The Acts of 1961 substituted Sections 2, 5 and 6 redefining the

3. The expressions 'Karens or' deleted by Section 5 of the Constitution Amendment Act, 1951.



4. All powers, legislative, executive and judicial, are derived from the people and are exercisable on their behalf by, or on the authority of, the organs of the Union or its constituent units established by this Constitution.

*Chapter II—Fundamental Rights*

9. **Definition of 'State':** In this Chapter and in Chapters III<sup>1</sup> and IV<sup>2</sup> the term 'State' means the executive or legislative authority of the Union or of the Unit concerned according as the context may require.

*Chapter XI—Amendment of the Constitution*

207. Any provision of this Constitution may be amended, whether by way of variation, addition, or repeal, in the manner hereinafter provided.

208. (1) Every proposal for an amendment of this Constitution shall be in the form of a Bill and shall be expressed as Bill to amend the Constitution.

(2) A Bill containing a proposal or proposals for the amendment of the Constitution shall contain no other proposals.

209. (1) Such Bill may be initiated in either Chamber of Parliament.

(2) After it has been passed by each of the Chambers of Parliament, the Bill shall be considered by both Chambers in joint sitting.

(3) The Bill shall be deemed to have been passed by both Chambers in joint sitting only when not less than two-thirds of the then members of both Chambers have voted in its favour.

(4) A Bill which seeks to amend—

(a) the State Legislative List in the Third Schedule, or

(b) the State Revenue List in the Fourth Schedule, or

(c) an Act of the Parliament making a declaration under paragraph (iv) of sub-section (i) of section 74 removing the disqualification of any persons for membership of the Parliament as representative from any of the States shall not be deemed to have been passed at the joint sitting of the Chambers unless a majority of

1. Relations of the State to Peasants and Workers.

2. Directive Principles of State Policy.

territorial limits of the Union and re-organising certain States; and added new Sections after Section 132 for providing a Permanent Election Commission.

#### 4. Constitution of The Dominion of Canada (1867)†

##### THE BRITISH NORTH AMERICA ACT, 1867

##### VI. *Distribution of Legislative Powers*

##### POWERS OF THE PARLIAMENT

91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Province; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extend to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

\*(1) The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a Province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.

##### *Exclusive Powers of Provincial Legislatures*

92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter mentioned; that is to say—

1. The Amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant Governor.

† Text of the Constitution supplied by the High Commissioner for Canada; New Delhi.

\* Inserted by the British North America Act (No. 2), 1949 (U.K.).

matter, writs shall be issued for the election of Members of a new Folketing. If the Bill is passed unamended by the Folketing assembling after the election, the Bill shall within six months after its final passage, be submitted to the Electors for approval or rejection by direct voting. Rules for this voting shall be laid down by Statute. If a majority of the persons taking part in the voting, and at least 40 per centum of the Electorate, have voted in favour of the Bill as passed by the Folketing, and if the Bill receives the Royal Assent, it shall form an integral part of the Constitutional Act.

## NOTE

The Constitution of 1849 was amended in 1915 to give franchise to women and servants. It reduced the voting age for the lower Chamber to 25, abolished electoral privileges of the upper Chamber extending franchise to men, women and servants of 35 and over and introduced proportional representation. In 1920 a minor amendment was carried to provide for reunion with North Slesvig. In 1938 more radical changes were proposed but did not come through because it failed to obtain the support in a referendum as required by the Constitution. The campaign was resumed after the Second World War and on June 5, 1933 a radical constitutional amendment was passed by an almost unanimous Parliament. Since then there has been no amendment of the Constitution.

The new Constitution abolished second Chamber, reduced voting age to 23 (further reduced to 21 by the Act of 1961), specifically provided for the parliamentary responsibility of the executive, and while vesting legislative power in the King and Folketing conjointly, the Executive power in the King and the judicial power in the Courts of Justice (article 3) provided for their delegation by statute to international authorities set up by mutual agreement with other States for the promotion of international rules of law and co-operation [article 20(1)]. The administration of justice is made independent of the executive (article 62) and the Courts of Justice are entitled to decide any question bearing upon the scope of the authority of the executive power [article 63 (1)]. The Constitution has conferred certain fundamental rights of absolute nature (articles 68, 70, 76, 77 and 78), some subject to certain conditions [articles 67, 73 (i), 74, 79 and 80] and others subject to be regulated by statute.

## 7. Form of Government of Finland Act, 1919\*

Article 2. Sovereign power in Finland belongs to the people represented by their delegates assembled in Diet.

\* Text of the 1946 Constitution as given in Amos J. Peaslee: *Constitutions of Nations*, 1956.

## 5. Ceylon

### THE CEYLON (CONSTITUTION) ORDER IN COUNCIL, 1946 (15th May, 1946)

29. (1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island.

(2) No such law shall—

- (a) Prohibit or restrict the free exercise of any religion; or
- (b) Make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or
- (c) Confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or
- (d) Alter the constitution of any religious body except with the consent of the governing authority of that body;  
Provided that, in any case where a religious body is incorporated by law no such alteration shall be made except at the request of the governing authority of that body.

(3) Any law made in contravention of sub-section (2) of this Section shall, to the extent of such contravention, be void.

(4) In the exercise of its powers under this Section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of His Majesty in Council in its application to the Island:

Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of members of the House (including those not present).

Every certificate of the Speaker under this sub-section shall be conclusive for all purposes and shall not be questioned in any court of law.

## 6. The Constitution of the Kingdom of Denmark Act 1953†

### THE SUCCESSION TO THE THRONE ACT, 27th MARCH, 1953

88. When the Folketing passes a Bill for the purposes of a new constitutional provision, and the Government wishes to proceed with the

† Text of the Constitution supplied by the Royal Danish Embassy, New Delhi.

matter, writs shall be issued for the election of Members of a new Folketing. If the Bill is passed unamended by the Folketing assembling after the election, the Bill shall within six months after its final passage, be submitted to the Electors for approval or rejection by direct voting. Rules for this voting shall be laid down by Statute. If a majority of the persons taking part in the voting, and at least 40 per centum of the Electorate, have voted in favour of the Bill as passed by the Folketing, and if the Bill receives the Royal Assent, it shall form an integral part of the Constitutional Act.

## NOTE

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## 7. Form of Government of Finland Act, 1919\*

Article 2. Sovereign power in Finland belongs to the people represented by their delegates assembled in Diet.

\* Text of the 1946 Constitution as given in Amos J. Peaslee: *Constitutions of Nations*, 1956.

*Chapter II***General Rights and Constitutional Protection of Finnish Citizens**

16. These provisions concerning the general rights of Finnish citizens shall constitute no obstacle to the establishment by law of restrictions which are necessary in time of war or insurrection, and, in respect to persons in the military or naval service, at any time.

*Chapter XI***Final Provisions**

95. This present Form of Government shall have in all its parts the sanctity of a fundamental law. It cannot be modified, interpreted, or repealed; nor can it be departed from, except in accordance with the procedure prescribed for fundamental laws in general.

*Diet Act, 1928*

(Adopted at Helsingfors, January 13, 1928)

67. In order to become a resolution of the Diet, every Bill concerning the adoption, amendment, interpretation, or abrogation of a fundamental law should, after having been treated as provided in article 66, at the third reading be approved by a majority of votes to be left pending until the first ordinary session after elections and should be adopted without change at this session by a resolution assembling at least two-thirds of the votes cast.

Nevertheless, if a bill referring to a fundamental law has been declared urgent in plenary sitting by a resolution at least five-sixths of the votes cast, the matter should be resolved without being left pending and the resolution should be taken up as stated in paragraph 1.

**NOTE**

The Constitution of Finland consists of the Form of Government of Finland Act, 1919, The Diet Act, 1919, The Diet Act, 1928. The Right of Parliament to Control the Lawful Discharge of Duties by the Members of the Council of State and the Chancellor of Justice Act, 1922 and the High Court of Impeachment Act, 1922 (to try Ministers for their illegal actions). The Form of Government of Finland Act, 1919 was enacted in accordance with the procedure prescribed in article 60 of the Diet Act, 1906. Keeping in view the experiences of the working of the 1919 Act further modifications were introduced under article 60 of the Act of 1906 by enacting The Diet Act, 1928. This Act has repealed the Act of 1906.

The Constitution has conferred fundamental rights on the citizens of Finland. Some of them [articles 5, 6(1) & (2), 9(1), 10(1)&(2), 14 and 15] are expressed in absolute terms and the others [articles 6(3), 7, 8, 9(2), 10(3), 11, 12 and 13] are subject to be regulated by law. Article 16, which permits imposition of restrictions in times of war or insurrection, is significant and suggests an inference that in no other circumstances it is possible to enact restrictions by ordinary legislation except what is permissible under the respective article. These rights are, however, non-justiciable and the courts have no power to review the constitutionality of the law passed by the Parliament. This is due to the tradition and constitutional history of Finland. Many legislative enactments manifestly at variance with the fundamental rights (nearly 600 upto 1966) were passed not by amending the Constitution but by considering them exceptions to the Constitution and by following the procedure for amending the Constitution itself. This was facilitated by the technique provided in the Proviso to article 67 of the Diet Act of 1928. The normal procedure of article 67 is applied in a few exceptional instances only. If the deviation of the Bill from the fundamental rights is not manifest and there is a difference of opinion on this between the Speaker and the Plenary Session of Parliament the matter is referred to the Constitutional Committee of the Parliament consisting of 17 members. The Committee consults outside specialists and lawyers and does not depart from the path of constitutionalism and respect for the Constitution. The Constitution enables the mistake of such judgment being corrected at the level of assenting the Bill by the President who on independent advice refuses to assent the Bill.

The Form of Government Act, 1919 did not contain provisions as to its amendment. It was provided in the Diet Act, 1928. Therefore, it was amended in 1933 in respect of tenure of Diet Solicitor. The Diet Act, 1928 was amended in 1937 to provide for appointment of trustees to administer national pension fund and twice in 1944 providing for deprivation of franchise in certain cases and freedom of speech in the legislature.

## 8. Constitution of the French Republic\*

### *Fourth Republic, 1946*

3. National sovereignty belongs to the French people.

No section of the people or any individual may assume its exercise.

The people shall exercise it in

### *Fifth Republic, 1958*

3. National sovereignty belongs to the people, which shall exercise this sovereignty through its representatives and by means of referendums.

\* Text of the 1946 Constitution as given in Amos J. Peaslee: *Constitutions of Nations*, 1956 and that of the 1958 Constitution as supplied by the French Embassy, New Delhi.

constitutional matters by the vote of their representatives or by the referendum.

In all other matters they shall exercise it through their deputies in the National Assembly, elected by universal, equal, direct and secret suffrage.

4. All French citizens and nationals of both sexes, who are of legal age and enjoy civil and political rights, may vote under conditions determined by the law.

90. Revision of the Constitution shall take place in the following manner:

Revision must be decided upon by a resolution adopted by an absolute majority of the members of the National Assembly.

This resolution shall stipulate the purpose of the revision.

After at least three months, this resolution shall have a second reading under the same rules of procedure as the first, unless the Council of the Republic to which the resolution has been referred by the National Assembly, has adopted the same resolution by an absolute majority.

After this second reading, the National Assembly shall draw up a bill to revise the Constitution. This bill shall be submitted to the Parliament and voted by a majority and according to the rules established for any ordinary act of the legislature.

No section of the people, nor any individual, may attribute to themselves or himself the exercise thereof.

Suffrage may be direct or indirect under the conditions stipulated by the Constitution. It shall always be universal, equal and secret.

All French citizens of both sexes who have reached their majority and who enjoy civil and political rights may vote under the conditions to be determined by law.

#### *TITLE XIV*

#### ON AMENDMENT

89. The initiative for amending the Constitution shall belong both to the President of the Republic on the proposal of the Premier and to the members of Parliament.

The Government or Parliamentary bill for amendment must be passed by the two Assemblies in identical terms. The amendment shall become definitive after approval by a referendum.

Nevertheless, the proposed amendment shall not be submitted to a referendum when the President of the Republic decides to submit it to Parliament convened in Congress; in this case, the proposed amendment shall be approved only if it is accepted by a three-fifths majority of the votes cast. The Secretariat of the Congress shall be that of the National Assembly.

No amendment procedure may be undertaken or followed when the integrity of the territory is in jeopardy.



It shall be submitted to a referendum unless it has been adopted on second reading by a two-thirds majority of the National Assembly or voted by a three-fifths majority of each of the two assemblies.

The bill shall be promulgated as a constitutional law within eight days after its adoption.

No constitutional revision relative to the existence of the Council of the Republic may be made without the concurrence of this Council, or resort to a referendum.

91. The constitutional committee shall be presided over by the President of the Republic.

It shall include the President of the National Assembly, the President of the Council of the Republic, seven members elected by the National Assembly at the beginning of each annual session by proportional representation of party groups and chosen outside its own membership and, three members elected under the same conditions by the Council of the Republic.

The constitutional committee shall determine whether the laws passed by the National Assembly require a revision of the Constitution.

92. In the period allowed for the promulgation of the law, the committee shall receive a joint request from the President of the Republic and the President of the Council of the Republic, the Council

The republican form of government shall not be subject to amendment.

## NOTE

The Constitution does not contain a Bill of Rights separately situated. However, the rights of equality before the law, prohibition against discrimination and freedom of belief [article 2 (1) and article 77 (3)] and the right not to be detained arbitrarily (article 66) are conferred under two distinct Titles (Parts). The Republic has adopted "liberty, equality, fraternity as its motto [article 2(4)] and the French people proclaimed their attachment *inter alia* to the Rights of Man (Preamble). In these declarations the Constitution assumes that fundamental freedoms and human rights are in the enjoyment of the French people. This is also evidenced in article 34 which says that the laws passed by Parliament shall establish *regulations* concerning *inter alia* civil rights and the fundamental guarantees granted to the citizens for the exercise of their public liberties [Cl. 2 (i)]; the fundamental guarantees granted to civil and military personnel employed by the State [Cl. 3(iii)]; and determine the fundamental principles of property rights [cl. 4 (iv)].

The Constitutional Council consists of nine members holding nine years' non-renewable term, three of whom are appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate. Former President of the Republic, however, become member *ex officio* for life in addition. Among other functions, the Council determines the constitutionality of the organic laws and other laws before they are promulgated and any provision of such laws declared unconstitutional may not be promulgated or implemented and the decision of the Council is not subject to appeal to any jurisdiction whatsoever. The legislative text of the matters falling outside the domain of law may be modified after consultation with the Council of State.

The Constitution has been amended on three times. The amendment of 1960 was adopted by the French Parliament under article 85<sup>1</sup>

1. Article 85: "By derogation from the procedure provided in article 89, the provisions of the present Title (i. e. on the French Community) that concern the functioning of the common institutions shall be amendable by identical laws passed by the Parliament of the Republic and by the Senate of the Community.

The provisions of the present Title may also be amended by agreements concluded between all the States of the community; the new provisions shall be put into force under the conditions required by the Constitution of each state". (This clause is added by the amendment of 1960).

## NOTE

The Constitution does not contain a Bill of Rights separately situated. However, the rights of equality before the law, prohibition against discrimination and freedom of belief [article 2 (1) and article 77 (3)] and the right not to be detained arbitrarily (article 66) are conferred under two distinct Titles (Parts). The Republic has adopted "liberty, equality, fraternity as its motto [article 2(4)] and the French people proclaimed their attachment *inter alia* to the Rights of Man (Preamble). In these declarations the Constitution assumes that fundamental freedoms and human rights are in the enjoyment of the French people. This is also evidenced in article 34 which says that the laws passed by Parliament shall establish *regulations* concerning *inter alia* civil rights and the fundamental guarantees granted to the citizens for the exercise of their public liberties [Cl. 2 (i)]; the fundamental guarantees granted to civil and military personnel employed by the State [Cl. 3(iii)]; and determine the fundamental principles of property rights [cl. 4 (iv)].

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which is an exception to article 89<sup>2</sup> and related to matters concerning (articles 83 and 86) member states *inter se* of French Community. The amendment of 1962 amended radically articles 6 and 7 relating to the election of the President of the Republic and filling of the vacancy. It was adopted by Referendum. The amendment of 1963 amended article 28 relating to the convening and duration of the sessions of Parliament and was adopted by Parliament convened in Congress.

## 9. The Basic Law of the Federal Republic of Germany, 1949†

### I. BASIC RIGHTS

1. (1) The dignity of man is inviolable. To respect and protect it is the duty of all state authority.
- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
- (3) The following basic rights bind the legislature, the executive and the judiciary as directly enforceable law.

\* \* \*

- 17a. (1) Laws concerning military service and alternative service may, by provisions applying to members of the Armed Forces and of alternative services during their period of military or alternative service, restrict the basic right freely to express and to disseminate opinions by speech, writing, and pictures [article 5 paragraph (1) first half-sentence], the basic right of assembly (article 8), and the right of petition (article 17) in so far as it permits to address requests or complaints jointly with others.
- (2) Laws for defence purposes, including the protection of the civilian population, may provide for the restriction of the basic rights of freedom of movement (article 11) and inviolability of the home (article 13).

18. Whoever abuses freedom of expression of opinion, in particular freedom of the press (article 5, paragraph 1), freedom of teaching (article 5, paragraph 3), freedom of assembly (article 8), freedom of association (article 9), the secrecy of mail, posts and telecommunications (article 10), property (article 14), or the right of asylum (article 16, paragraph 2)

2. A second exception to article 89 is introduced in article 7(6) by the amendment of 1962:

"There may be no application of.....article 89 of the Constitution during the vacancy of the Presidency of the Republic or during the period that elapses between the declaration of the definitive character of the impediment of the President of the Republic and the election of his successor."

† Text of the Constitution supplied by the Embassy of the Federal Republic of Germany, New Delhi.

in order to attack the free democratic basic order, forfeits these basic rights. The forfeiture and its extent are pronounced by the Federal Constitutional Court.

19. (1) Insofar as under this Basic law a basic right may be restricted by or pursuant to a law, the law must apply generally and not solely to an individual case. Furthermore, the law must name the basic right, indicating the article.
- (2) In no case may a basic right be infringed upon in its essential content.
- (3) The basic rights apply also to corporations established under German Public Law to the extent that the nature of such rights permits.
- (4) Should any person's right be violated by public authority, recourse to the court shall be open to him. If no other court has jurisdiction, recourse shall be to the ordinary courts.

## II. THE FEDERATION AND THE LÄNDER

20. (1) The Federal Republic of Germany is a democratic and social federal state.
- (2) All state authority emanates from the people. It is exercised by the people by means of elections and voting and by separate legislative, executive and judicial organs.
- (3) Legislation is subject to the constitutional order; the executive and the judiciary are bound by the law.
24. (1) The Federation may, by legislation, transfer sovereign powers to international institutions.
- (2) For the maintenance of peace, the Federation, may join a system of mutual collective security; in doing so it will consent to such limitations upon its sovereign powers as will bring about and secure a peaceful and lasting order in Europe and among the nations of the world.
- (3) For the settlement of disputes between nations, the Federation will accede to agreements concerning a general, comprehensive and obligatory system of international arbitration.
25. The general rules of public international law form part of the federal law. They take precedence over the laws and directly create rights and duties for the inhabitants of the Federal territory.

26. (1) Activities tending and undertaken with the intent to disturb peaceful relations between nations, especially to prepare for aggressive war, are unconstitutional. They shall be made a punishable offense.
- (2) Weapons designed for warfare may be manufactured, transported or marketed only with the permission of the Federal Government. Details will be regulated by a federal law.

## VII. LEGISLATIVE POWERS OF THE FEDERATION

79. (1) The Basic Law can be amended only by a law which expressly amends or supplements the text thereof.

With respect to international treaties the subject of which is a peace settlement, the preparation of a peace settlement or the abolition of an occupation regime, or which are designed to serve the defence of the Federal Republic, it shall be sufficient, for the purpose of a clarifying interpretation to the effect that the provisions of the Basic Law are not contrary to the conclusion and entry into force of such treaties, to effect a supplementation of the text of the Basic Law confined to this clarifying interpretation.

- (2) Such a law requires the affirmative vote of two-thirds of the Bundestag and two-thirds of the votes of the Bundesrat.
- (3) An amendment of this Basic Law affecting the division of the Federation into Laender, the participation in principle of the Laender in legislation, or the basic principles laid down in articles 1 and 20, is inadmissible.

## NOTE

The Constitution has given prominent place to the fundamental rights, some of them are absolute [articles 1, 3, 4 (1 & 2), 12 (3), 101 (1), 102 and 103 (2 & 3)], some subject to general law (Articles 2(2), 4 (3), 5(1 & 2), 8, 10, 12 (1), 14, 16 (1), 103 and 104) and other to be restricted on the stipulated grounds [articles 2(1), 5 (3), 7, 9, 11, 12 (4), 13 and 16 (2)]. Since all enumerated fundamental rights are self-executing and automatically binding on legislation, administration and judiciary [article 1(3)] anybody whose right is infringed by the public authority may seek judicial redress. Article 14 (3) specifically confers the right to go to the ordinary court to resolve dispute regarding the amount of compensation for the property expropriated. This apart, article 17 confers a right to address individually or jointly with others written requests or complaints to the competent authorities and to the representative assemblies. Anyone who abuses the rights, as mentioned in article 18 forfeits the rights to the extent pronounced by the Federal Constitutional Court.

The Federal Constitutional Court consists of Federal Judges and other members half of which are elected by the Bundestag and the other half by the Bundesrat. The Court has jurisdiction to decide on the interpretation of the Constitution in the event of disputes concerning the rights and duties of a supreme Federal organ or other parties who have rights under the Constitution etc., in case of difference of opinion on the compatibility of Federal Law or Land Law with other Federal Law; in case of differences of opinion on the rights and duties of the Federation and Laender or other disputes of Public law between the Federation and the Laender or between different Laenders; in other cases provided in the Constitution; and other matters as might be assigned to it by Federal Law.

Upto 1961, the Constitution was amended on ten occasions of which two amendments were of fundamental rights including article 1, of course without affecting it. One amendment inserted article 17a providing for restricting the rights in articles 5(1), 8 and 17 by law concerning military service and alternative service and rights in articles 11 and 13 for defense purposes including the protection of the civilian population.

#### 10. Political Constitution of the Republic of Honduras 1936†

##### TITLE IV

##### *The Form of Government*

86. The Government of Honduras is republican, democratic and representative: It is exercised by three independent powers: legislative, executive and judicial.

87. None of the constituted powers shall perform acts by which the form of the established government is altered or the integrity of the territory or the national sovereignty is impaired.

88. The dispositions of this Constitution do not oppose the treaties that may be concluded with one or more sections of the former Republic of Central America with the purpose of returning to the Union.

117. The Presidential period shall be six years and shall begin on the first January.

118. The following may not be elected President or Vice-President for the following term:

1. The citizen who shall have exercised the presidency in proprietary right or ad interim, in the course of a term;
2. The secretaries of state who exercise or have exercised their office six months before the elections occur;
3. The relatives of the President or Vice-President of the Republic within the fourth degree of consanguinity or affinity.

† Text of the Constitution as given in Amos J. Peaslee: *Constitutions of Nations*, 1956.

200. The Constitution and the Constitutive laws may be reformed partially by a Congress in ordinary session, with two-thirds of the votes of its members, the respective decree having to be ratified by the following ordinary legislature, also by two-thirds of the votes of the members, in order that the reform may go into effect.

The reform of articles 117, 118, and 200 or of one or more of these three, and the total reform of the Constitution and the Constitutive laws can only be effected by a Constitutional Assembly, convoked for this purpose by the National Congress.

## NOTE

The Constitution has conferred rights and guarantees in a separate Part (Title III). In addition it is stated in article 81 that this enumeration of rights and guarantees does not exclude those not enumerated that derive from the principle of the sovereignty of the people and the Republican form of governments. Article 82 declares that the laws that regulate the exercise of such guarantees and rights shall be null in so far as they diminish, restrain, or corrupt them. At the same time article 83 permits temporary suspension of the rights of habeas corpus; not to be arrested without lawful authority; not to be detained beyond six months; inviolability of domicile; not to be conveyed to prison if able to give security in certain cases; remuneration for services; freedoms of speech, assembly without arms and of association for lawful purposes; and to travel abroad, when the security of State so demands; in case of invasion, grave disturbance of order menacing public peace, epidemic or other calamity. It is, however, enjoined that no new offences can be declared during the suspension of these rights. The suspension of the rights can be ordered only by the Congress and when it is not in session by the executive, who can do so only for a period not more than 60 days.

Under article 145, petitions may be instituted before the Supreme Court challenging the constitutionality of a law referring to matters not subject to examination before the tribunals, by any person who, on its being applied to him in a concrete case, may be prejudiced in his rights. The regulation of this remedy is left to be provided by law.

## 11. Constitution of Ireland (Eire), 1937†

6. (1) All powers of government, legislative, executive and judicial, derive under God, from the people, whose right it is to designate the rulers of the State and, in final appeals, to decide

† Text of the Constitution supplied by the Embassy of Ireland, New Delhi.



all questions of national policy, according to the requirements of the *common good*.

- (2) These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution.
46. (1) Any provision of this Constitution may be amended, whether by way of variation, addition, or repeal, in the manner provided by this article.
- (2) Every proposal for an amendment of this Constitution shall be initiated in Dail Eireann as a bill, and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by referendum to the decision of the people in accordance with the law for the time being in force relating to the referendum.
- (3) Every such bill shall be expressed to be "An Act to amend the Constitution".
- (4) A bill containing a proposal or proposals, for the amendment of this Constitution shall not contain any other proposal.
- (5) A bill containing a proposal for the amendment of this Constitution shall be signed by the President forthwith upon his being satisfied that the provisions of this article have been complied with in respect thereof and that such proposal has been duly approved by the people in accordance with the provisions of section (1) of article 47 of this Constitution and shall be duly promulgated by the President as law.

#### THE REFERENDUM

47. (1) Every proposal for an amendment of this Constitution which is submitted by referendum to the decision of the people shall, for the purpose of article 46 of this Constitution, be held to have been approved by the people if, upon having been so submitted, a majority of the votes cast at such referendum shall have been cast in favour of its enactment into law.
- (2) (a) Every bill and every proposal, other than a proposal to amend the Constitution, which is submitted by referendum to the decision of the people shall be held to have been voted by the people if a majority of the votes cast at such referendum shall have been cast against its enactment into law and if the votes so cast against its enactment into law shall have amounted to not less than thirty-three and one-third per cent of the voters on the register.

- (b) Every bill and every proposal, other than a proposal to amend the Constitution, which is submitted by referendum to the decision of the people shall for the purposes of article 27 thereof be held to have been approved by the people unless voted by them in accordance with the provisions of the foregoing subsection of this section.
- (3) Every citizen who has the right to vote at election for members of Dail Eireann shall have the right to vote at a referendum.
- (4) Subject as aforesaid, the referendum shall be regulated by law.

## NOTE

The Constitution has conferred fundamental rights on the individuals. The principles of social policy set forth under the 'Directive Principles of Social Policy' are intended, however, for the general guidance of the Parliament. The Supreme Court is invested with the power of judicial review of the constitutionality of the laws and the Constitution prohibits making of a law excluding the appellate jurisdiction of the Supreme Court in respect of matters involving questions as to the constitutional validity of the laws. It is significantly provided that the *constitutional decisions of the Court are to be announced by such of the judges as the Court shall direct and enjoins that neither the opinion dissenting or assenting to the contrary be announced nor the existence of such contrary opinion be disclosed.*

The Constitution has not so far been amended under articles 46 and 47. However, under the power given by article 51 to the Parliament to amend the Constitution during the transitory period the Constitution was amended on two occasions, one in 1939 and the other in 1941. Both these amendments made alterations in article 28(3) (iii) confining the immunity from constitutional validity of the acts done under the laws enacted for the purpose of securing public safety and the preservation of the State in time of war or armed rebellion to such period and defining time limit of the latter eventuality.

## 12. Constitution of the Republic of Italy 1948†

### BASIC PRINCIPLES

1. Sovereignty belongs to the people, who exercise it in the manner and within the limits laid down by Constitution.
2. The Republic recognizes and guarantees the inviolable rights of man, both as an individual and as a member of the social groups in

† Text of the Constitution supplied by the Italian Embassy, New Delhi.

in which his personality finds expression, and imposes the performance of unilateral duties of a political, economic and social nature.

10. Italy's legal system conforms with the generally recognised principles of International law.

## PART I

### *Right and Duties of Private Citizens*

## TITLE I

### *Civil Relations*

28. Officers and employees of the State and of public bodies are directly responsible, according to the criminal, civil and administrative laws, for acts committed in violation of rights. In such cases civil responsibility extends to the State and to public bodies.

## PART II

### *Organisation of the Republic*

## TITLE VI

### *Constitutional Guarantees*

## SECTION I

### *Constitutional Court*

134. The Constitutional Court decides:

On controversies concerning the constitutional legitimacy of laws and acts having the force of law, emanating from central and regional government;

On controversies arising over constitutional assignment of powers within the State, between the State and the Regions, and between Regions;

On impeachment of the President of the Republic and Ministers, according to the norms of the Constitution.

136. When the Court declares a norm of law, or an act having the force of law, to be unconstitutional, the norms cease to have effect from the day following the publication of the decision.

The decision of the Court is published and is communicated to Parliament and the interested Regional Councils in order that provisions may be made in constitutional form where considered necessary.

137. ...The decisions of the Constitutional Court may not be contested.

## SECTION II

*Amendments to the Constitution—Constitutional Laws*

138. Amendments to the Constitution and other constitutional laws are passed by the Chamber of Deputies and the Senate in two successive sessions at an interval of not less than three months and are approved by an absolute majority of the members of each Chamber on the second reading.

The laws themselves are submitted to popular referendum when, within three months of their publication a demand shall be made by one-fifth of the members of other chamber or five hundred thousand electors or by five regional councils. A law submitted to referendum shall not be promulgated unless approved by a majority of valid votes.

A referendum shall not be held if the law has been approved in both Chambers, during a second reading, by a majority of two thirds of the members of each Chamber.

139. The Republican structure is not subject to constitutional amendment.

**NOTE**

The Constitution has conferred rights of equality, local autonomy, linguistic protection and religious freedoms under the heading 'Basic Principles' of the Constitution. Other rights and duties of private citizens are: (1) Civil Relations—articles 13 to 28, (2) Ethical and social relations—articles 29 to 34, (3) Economic relations—articles 35 to 47, and (4) Political relations—articles 48 to 54.

Article 134 invests the Constitutional Court with the power to review and nullify legislation and acts having the force of law if they are found to be inconsistent with the Court's interpretation of the Constitution. This marks a break with the tradition of legislative supremacy which has been dominant in Italy so far. However, article 136 recognises the right of the legislature to act in accordance with its own understanding of the Constitution and when so done it is valid. The Court's interpretation to the contrary would have operation prospectively.

The Constitution has made a distinction between the 'Constitution' and the 'Constitutional law', the latter referring to the laws supplementing the Constitution wherever it is sought to be provided by the Constitution and the laws amending the Constitution. But the amending process in article 138 is applicable to both without any differentiation. The normal procedure for debating and voting of Bills is equally applied to the Bills of a constitutional nature—article 72.

The Republic has so far amended the Constitution only *thrice*, in 1948<sup>1</sup>, in 1953<sup>2</sup> and in 1963<sup>3</sup> but none of them affected fundamental rights.

### 13. Japan

#### CONSTITUTION OF JAPAN†

November 3, 1946

We, the Japanese people, acting through our duly elected representatives in the National Diet, determined that we shall secure for ourselves and our posterity the fruits of peaceful co-operation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government, do proclaim that sovereign power resides with the people and do firmly establish this Constitution. Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people. This is a universal principle of mankind upon which this Constitution is founded. We reject and revoke all constitutions, laws, ordinances, and rescripts in conflict herewith.

#### *Chapter III—Rights and Duties of the People*

11. The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.

12. The freedom and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavour of the people, who shall refrain from any abuse of these freedoms and shall always be responsible for utilising them for the public welfare.

#### *Chapter IX—Amendments*

96. Amendments to this Constitution shall be initiated by the Diet through a concurring vote of two-thirds or more of all the members of each House and shall thereupon be submitted to the people for referendum, which shall require the affirmative vote of all votes cast thereat, or a special referendum or at such election as the Diet shall specify.

Amendments when so ratified shall immediately be promulgated by the Emperor in the name of the people, as an integral part of this Constitution.

### *Chapter X—Supreme Law*

97. The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.

98. This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.

### **NOTE**

The Constitution of 1946 is in abrogation of the Constitution of 1889, which was promulgated by the Emperor as a 'gift to the people'. The Constitution of 1889 contained a chapter entitled 'Rights and Duties of the Subjects' conferring series of rights (articles 18 to 32) but in every instance these rights were qualified by the phrases like 'within the limits of law' and 'except in cases provided for in the law.' Although this Constitution had established executive, legislative and judicial departments it did not confer power on the courts of law to interpret the Constitution. The judicature was required to be exercised 'according to law, and in the name of the Emperor' (article 57). However, in practice it was interpreted by the courts and in some cases by the Privy Council. It had provided for the amendment of the Constitution only at the initiative of the Emperor and when it was discussed by not less than two-thirds of the total number of members of the Diet and passed by a majority of not less than two-thirds of the Members present (article 73). The Constitution, however, was never amended.

The Constitution of 1946 has made a significant departure from the old Constitution in as much as the 'Rights of the People' are available not only against the Executive but also against the legislature and it specifically enjoins that the people shall not be prevented from enjoying the Fundamental Human Rights which are conferred as eternal and inviolate rights upon this and future generations. The Bill of Rights incorporates not only classical rights but also elevates new emerging social and economic rights to the rank of fundamental rights. Except rights enumerated in articles 17, 22, 27, 29, 30, 31 and 40 which are subject to either 'public welfare' or 'as provided by law' all other rights are expressed in absolute terms. However, from article 12, which imposed a

duty on the people *inter alia* to refrain from any abuse of these freedoms and rights and made them responsible for utilizing them for the public welfare and article 25 enjoins on the State to use its endeavours in all spheres of life, for the promotion of and extension of social welfare and security, and of public health, it could be inferred that all these rights can be limited by the legislature in the interest of public welfare. To make these rights positive the right of access to the courts is guaranteed (article 32) and a right to sue for redress as provided by law from the State or a public entity for damages suffered through illegal acts of any public official (article 17) is conferred.

By article 81, the Supreme Court is vested with the power to determine the constitutionality of any law, order, regulation or official act and it is made the Court of last resort. "This enables the Supreme Court to exercise political power to check the Diet on behalf of the Sovereign people."<sup>1</sup> The Chief Judge is appointed by the Emperor as designated by the Cabinet and other judges by the Cabinet. However, the appointment of the judges is required to be reviewed by the people at the first general election of members to the House of Representatives following their appointment and to be periodically reviewed at the first general election after every ten years. If the majority of the voters favours the dismissal of a judge, he shall be dismissed (article 6 (2) and 79).

The Constitution has not so far been amended. "Given the circumstances surrounding the drafting and adoption of the Constitution, the question remains whether it is likely to become rooted in Japanese political life. Conservatives have openly expressed their desire to amend the Constitution in order to strengthen the position of the Emperor and the Cabinet and generally to return, although not all the way, to the old Constitution. Liberals and socialists on the other hand, have supported the Constitution and even have argued in favour of strengthening portions of it, such as the section on civil liberties. In view of the lack of consensus on this problem and the necessity of obtaining, in order to amend the Constitution, a two-thirds majority in Diet and majority of the popular vote, it would seem unlikely that the Constitution will be drastically changed in the foreseeable future."<sup>2</sup>

1. Harold S. Quigley: *The New Japan*, 1956, p. 173.
2. Nobutak Ike: Japan in 'Major Governments of Asia', 1963 ed. Kahin, pp. 181-5. "The new Constitution is not, in fact, a revision but an entirely new instrument of government. Japan's fundamental law has been fundamentally changed. Whether or not a corresponding change will occur in Japan's political way of life, thus infusing reality into legality, only time will tell." Harold S. Quigley: *The New Japan*, 1956, p. 165.

## 14 Federation of Malaya

## CONSTITUTION OF FEDERATION OF MALAYA†

(August 31, 1957)

4. (1) This Constitution is the Supreme Law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.
- (2) The validity of any law shall not be questioned on the ground that—
- (a) it imposes restrictions on the right mentioned in Article 9 (2)\* but does not relate to the matters mentioned therein, or
  - (b) it imposes such restrictions as are mentioned in Article 10 (2)\*\* but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.
- (3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except—
- (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;
  - (b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.
159. (1) Subject to the following provisions of this Article, the provisions of this Constitution may be amended by federal law.

† Text of the Constitution, as published by the Government of Malaya.

\* A citizen's right to move freely throughout the Federation and to reside in any part thereof may be restricted by law relating to security of the Federation, public order, public health or the punishment of offenders.

\*\* It permits imposition of restrictions on the (a) freedom of speech and expression on grounds of necessity, or expediency in the interest of the security of the Federation, friendly relations with other countries, public order or morality and to protect the privileges of Parliament or Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence; (b) right to assembly peaceably and without arms on the grounds of necessity or expediency in the interest of the security of the Federation or public order; and (c) right to form associations on the grounds of necessity or expediency in the interest of the security of the Federation, public order or morality.



- (2) No amendments to this Constitution shall be made before Parliament is constituted in accordance with Part IV except such as the Legislative Council may deem necessary to remove any difficulties in the transition from the constitutional arrangements in operation immediately before Merdeka Day to those provided for by this Constitution; but any law made in pursuance of this clause shall, unless sooner repealed, cease to have effect at the expiration of a period of twelve months beginning with the day on which Parliament first meets.
- (3) A Bill for making any amendment to the Constitution (other than an amendment excepted from the provisions of this clause) shall not be passed in either House of Parliament unless it has been supported on Second and Third Reading by the votes of not less than two-thirds of the total number of members of that House.
- (4) The following amendments are excepted from the provisions of clause (3), that is to say—
  - (a) any amendment to the Second, Sixth or Seventh Schedule;
  - (b) any amendment incidental to or consequential on the exercise of any power to make law conferred on Parliament by any provision of this Constitution other than Articles 74 and 76; and
  - (c) any amendment incidental to or consequential on the repeal of a law made under clause (2) or consequential on an amendment made under paragraph (a).
- (5) A law making an amendment to Article 38, 70, 71 (1) or 153 shall not be passed without the consent of the Conference of Rulers.
- (6) In this Article "amendment" includes addition and repeal.

## NOTE

The Constitution guarantees Fundamental Liberties. Some of the rights are expressed in absolute term (articles 6(1), 7(1), 9(1), and 12(1) (2-first part) and (3), some subject to restrictions as may be imposed by law (articles 5 (1), 12 (2-second part) and 13 (1), and others subject to restrictions on certain specified grounds (articles 6(2)&(3), 7(2), 8, 9(2), 10, 11, and 13(2)). However, the power of judicial review is very much restricted vide article 4(2) and (3).

The Constitution was amended in 1960 and 1965. The 1960 amendment extended Parliament's power in respect of Preventive Detention so

as to enable it to take action when a state of emergency is declared. The 1965 amendment was to provide for the secession of the State of Singapore from the Federation.

## 15. Norway

### CONSTITUTION OF THE KINGDOM OF NORWAY†

(May 17, 1814 with amendments)

112. If experience proves that any part of the Constitution of the Kingdom of Norway ought to be changed, a proposal to this effect shall be submitted to the first, second or third ordinary Storting after a general election, and be published in print. But it shall be left to the first, second or third ordinary Storting after the following general election to decide whether or not the proposed amendment shall be adopted. Such amendment must, however, never contradict the principles embodied in this Constitution, but merely relate to modifications of particular provisions which do not alter the spirit of this Constitution, and should receive the support of two-thirds of the members of the Storting.

An amendment of the Constitution adopted in the manner aforesaid shall be signed by the President and the Secretary of the Storting, and be sent to the King for public notification in print, as forming an integral part of the Constitution of the Kingdom of Norway.

## NOTE

The Fundamental Act of Norway was influenced by British political tradition, as well as by the principles of the Constitution of the United States and the ideas of the French Revolution: the inviolable rights of the individual, the sovereignty of the people, the division of power among King, Parliament and Courts of Justice. Of the fundamental rights conferred in the part dealing with the "general provisions" some are expressed in absolute terms (articles 95, 96(2), 97, 98, 101, 102, 104, 105, 108 and 110), one is subject to certain conditions (article 100) and others are subject to be regulated by law (articles 88, 94, 96 (1), 99 and 107).

The Supreme Court of Justice is the final court of appeal in all matters and its judgments are non-appealable. The right to bring an action in the Supreme Court may be limited by law. If the two judges consider that a provision laid down by an Act, by decision of the Storting (Parliament) or by decree given by the Administration, is at variance

† Text of the Constitution supplied by the Royal Norwegian Embassy, New Delhi.

with the Constitution the case is decided by the complete Court of 21 judges. The jurisdiction of the Constitutional Court of the Realm which consists of the permanent judges of the Supreme Court and the ordinary members of the Lagting (Upper House), is limited to the action by the Odelsting (Lower House) against the members of the Council of State (Ministers), Supreme Court and Storting for criminal offences committed in the official capacity.<sup>1</sup>

In all two-thirds articles of the Constitution have been altered in accordance with the procedure laid down in article 112. The most important changes related to the extension of franchise, from time to time, to adults both male and female of at least 21 years age; to providing for limiting the exercise of exclusive powers of Norwegian authorities without altering the Constitution in order to secure international peace and security, to promote international law and order and cooperation between nations if Storting consents at least by a 3/4 majority; and for adding second clause to article 112 itself. None of the fundamental rights, however, have been abridged or taken away. On the contrary two new rights were conferred by amending the Constitution: (1) prohibiting the Government to employ military force against subjects of the State except as prescribed by law or when the meeting disturbs public peace, and (2) imposing obligation on the State to create conditions which make it possible for every able bodied person to earn his living by his work.

## 16. Pakistan

### CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN†

(Passed on the 29th February, 1956)

#### PART II

##### *Fundamental Rights*

3. In this Part, *unless the context otherwise requires*, 'the State' includes the Federal Government, Parliament, the Provincial Governments, the Provincial legislatures, and all local or other authorities in Pakistan.
4. (1) Any existing law, or any custom or usage having the force of law, *in so far as it is inconsistent with the provisions of this part*, shall, to the extent of such inconsistency, be void.  
(2) The State shall not make any law which takes away or abridges the rights conferred by this part, and any law in

1. The Court has pronounced eight judgments (1816, 1821, 1822, 1827, 1836, 1845, 1831 and 1927).

† Text of the 1956 Constitution as given in Burohit: *Fundamental Law of Pakistan*, and that of the 1962 Constitution as published by the Government of Pakistan.

contravention of this clause shall, to the extent of such contravention, be void.

(3) Nothing in this Article shall apply to any law relating to the members of the Armed Forces or the forces charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them.

216. (1) The Constitution or any provision thereof may be amended or repealed by an Act of Parliament if a bill for that purpose is passed by a majority of the total number of members of the National Assembly and by the votes of not less than two-thirds of the members of that Assembly present and voting, and is assented to by the President:

Provided that if such a Bill provides for the amendment or repeal of any of the provisions contained in Articles 1, 31, 39, 44, 77, 106, 118, 119, 199<sup>1</sup> or this Article, it shall not be presented to the President for his assent unless it has been approved by a resolution of each Provincial Assembly, or, if applies to one Province only, of the Provincial Assembly of that Province:

Provided further that the Schedules, other than the Fifth Schedule<sup>2</sup> and Part IV of the Fourth Schedule<sup>3</sup>, may be amended or repealed if a Bill for that purpose is passed by a majority of the members present and voting and is assented to by the President.

Provided further that a Provincial Legislature may by law make provisions with respect to matters specified in Part IV of the Fourth Schedule.

(2) A certificate under the hand of the Speaker of the National Assembly that a Bill has been passed in accordance with the provisions of clause (1) shall be conclusive, and shall not be questioned in any court.

1. Articles 1, 31, 39, 44, 77, 106, 118, 119 and 199 relate to the following matters:  
 Republic and its territories (article 1);  
 Provision for equal participation in national activities by people of all parts of Pakistan (article 31);  
 Extent of executive authority of the Federation (article 39);  
 Composition of the National Assembly (article 44);  
 Composition of Provincial Assembly (article 77);  
 Subject matter of Federal and Provincial Laws (article 106);  
 National Finance Commission (article 118);  
 Inter-Provincial trade (article 119); and  
 National Economic Council (article 199).
2. Legislative lists.
3. Remuneration and privileges in the provinces, and procedure and privileges of a Provincial Assembly.

## NOTE

In providing for the fundamental rights and the power of judicial review the Constitution mainly followed the pattern of the Indian Constitution. The Constitution came into force on February 29, 1956 and was abrogated on October 7, 1958, as it failed to secure stable government. The military took over the regime and created Basic Democracies as franchise units. After seeking the vote of confidence from them, the President appointed a Constitution Commission and in the light of its recommendations announced the new Constitution on March 1, 1962. The new Constitution provides for the Presidential System of Government and indirect elections to the office of the President and Central and Provincial Legislatures as opposed to Cabinet Form of Government and direct elections to the Legislatures under the 1956 Constitution.

The Constitution of 1962 did not provide for the justiciable fundamental rights and instead stated them as principles of law-making enjoining on the Legislatures to ensure that the laws do not disregard or violate them. However, the responsibility for deciding whether or not the laws are in disregard or violative of these principles was to be of the Legislature concerned and such a decision was not to be questioned. To meet the growing demands the 1964 amendment made these rights justiciable and enforceable in the Courts but excepted from its purview thirty one statutes etc. that were enacted during the Martial Law Regime and excluded High Court's and Supreme Court's jurisdiction from the tribal areas.

The Constitution was again amended in 1965 to advance the date of Presidential election by five months and to fix the life of the electoral college at five years.

The Constitution of 1962 has laid down a different procedure for the amendments which is as follows:

## PART XI

*Amendment of Constitution*

203. Subject to this Part, this Constitution may be amended by an Act of the Central Legislature.

209(1) A Bill to amend this Constitution shall not be presented to the President for assent unless it has been passed by the votes of not less than two-thirds of the total number of members of the National Assembly.

(2) The following provisions of this Article shall apply in relation to such a Bill in lieu of the Provisions of clauses (2) to (6) (inclusive) of Article 27.†

† It lays down the procedure for assenting Bills by the President.

(3) The President shall, within thirty days after a Bill to amend this Constitution is presented to him—

- (a) assent to the Bill;
- (b) declare that he withholds assent from the Bill; or
- (c) return the Bill to the National Assembly with a message requesting that the Bill, or a particular provision of the Bill be reconsidered and that any amendments specified in the message be considered;

but if the President fails to do any of those things within the period of thirty days, he shall be deemed to have assented to the Bill at the expiration of that period.

(4) If the President declares that he withholds assent from the Bill, the National Assembly shall be competent to reconsider the Bill and, if the Bill is again passed by the Assembly (with or without amendment) by the votes of not less than three-quarters of the total number of members of the Assembly, the Bill shall again be presented to the President for assent.

(5) If the President returns the Bill to the National Assembly, the Assembly shall reconsider the Bill and if—

- (a) the Bill is again passed by the Assembly, without amendment or with the amendments, specified by the President in his message or with amendments which the President has subsequently informed the Speaker of the Assembly are acceptable to him, by the votes of not less than two-thirds of the total number of members of the Assembly; or
- (b) the Bill is again passed by the Assembly, with amendment of a kind not referred to in paragraph (a) of this clause, by the votes of not less than three-quarters of the total number of members of the Assembly,

the Bill shall again be presented to the President for assent.

(6) When the Bill is again presented to the President for assent in pursuance of clause (4) or clause (5) of this Article, the President shall, within ten days after the Bill is presented to him—

- (a) assent to the Bill, or
- (b) cause to be referred to a referendum under Article 24 the question whether the Bill should or should not be assented to,

but if, within the period of ten days, the President fails to do either of those things and the Assembly is not dissolved, the President shall be deemed to have assented to the Bill at the expiration of that period.

(7) If, at a referendum conducted in relation to a Bill by virtue of Paragraph (b) of clause (6) of this Article, the votes of a majority of the total number of members of the Electoral College are cast in favour of the Bill being assented to, the President shall be deemed to have assented to the Bill on the day on which the result of the referendum is declared.

210. A Bill to amend this Constitution which would have the effect of altering the limits of a Province shall not be passed by the National Assembly unless it has been approved by a resolution of the Assembly of the Province passed by the votes of not less than two-thirds of the total number of members of that Assembly.

## 17. The Philippines

### CONSTITUTION OF THE PHILIPPINES†

(February 8, 1935 as amended)

#### ARTICLE XV

##### *Amendments*

1. The Congress in Joint Session assembled, by a vote of three-fourths of all the members of the Senate and of the House of Representatives voting separately, may propose amendments to this Constitution or call a convention for that purpose. Such amendments shall be valid as part of this Constitution when approved by a majority of the votes cast at an election at which the amendments are submitted to the people for their ratification.

#### NOTE

The Constitution contains Bill of Rights in Article III. Some of the rights are expressed in absolute terms (clauses 7, 8, 9 (first part), 10, 11, 12, 17, 18, 19, 20 and 21), some are subject to restrictions imposed by law (clauses 1(1), 4, 6, and 15) and others subject to restrictions imposed by law on certain specified grounds (clauses 1(2), 3, 5, 9 (2nd part), 13, 14 and 16).

Under article VIII, Section 2 the Congress is prohibited *inter alia* from depriving the Supreme Court of its appellate jurisdiction in all cases in which the constitutionality or validity of any treaty, law, ordinance, or executive order or regulation is in question.

The Constitution was amended in 1939 and 1940 by the National Assembly itself and in 1947 by the Congress and later approved in plebiscite.

† Text of the Constitution as given in Amos J. Peaslee: *Constitution of Nations*, 1936.

**18. Turkey****CONSTITUTION OF THE TURKISH REPUBLIC (1961)†****PART ONE***General Principles***I. Form of the State:**

1—The Turkish State is a Republic.

**IV. Sovereignty:**

4—Sovereignty is vested in the nation without reservation and condition.

The nation shall exercise its sovereignty through the authorized agencies as prescribed by the principles laid down in the Constitution.

The right to exercise such sovereignty shall not be delegated to any one person, group or class. No person or agency shall exercise any state authority which does not derive its origin from the Constitution.

**VIII. Supremacy and binding force of the Constitution:**

8—Laws shall not be in conflict with the Constitution.

The provisions of the Constitution shall be the fundamental legal principles binding the legislative, executive and judicial organs, administrative authorities and individuals.

**IX. Irrevocability of the form of the State:**

9—The provision of the Constitution establishing the form of the State as a republic shall not be amended nor shall any motion therefor be made.

**PART TWO***Fundamental rights and duties***SECTION ONE***General Provisions***I. The nature of the fundamental rights and their protection:**

10—Every individual is entitled, in virtue of his existence as a human being to fundamental rights and freedoms, which cannot be usurped, transferred or relinquished.

The State shall remove all political, economic and social obstacles that restrict the fundamental rights and freedoms of the individual in such a way as to be irreconcilable with the principles embodied in the rule of law, individual well-being and social justice. The State prepares the conditions required for the development of the individual's material and spiritual existence.

† Text of the Constitution supplied by the Turkish Embassy, New Delhi.



## II. The essence of the basic rights:

11—The fundamental rights and freedoms shall be restricted by law only in conformity with the letter and spirit of the Constitution.

The law shall not infringe upon the essence of any right or liberty not even when it is applied for the purpose of upholding public interest, morals and order, social justice as well as national security.

### PART THREE

#### *The basic organisation of the republic*

### SECTION THREE

#### *The Judiciary*

## D. THE CONSTITUTIONAL COURT

### II. Function and powers:

147—The Constitutional Court shall review the constitutionality of laws and the by-laws of the Turkish Grand National Assembly.

The Constitutional Court shall try as a High Council, the President of the Republic, the members of the Council of Ministers; the Chairman and members of the Court of Cassation; the Council of State; the Military Court of Cassation; the Supreme Council of Judges and the Court of Accounts, the Chief Prosecutor of the Republic, the Chief Attorney, the Chief Prosecutor of the Military Court of Cassation, as well as its own members for offences connected with their duties; and it discharges such other duties as prescribed by the Constitution.

In case the Constitutional Court sits as a High Council, the duty of public prosecutor shall be discharged by the Chief Prosecutor of the Republic.

### IV. Annulment suits:

#### (a) *Right of litigation:*

149—The President of the Republic, the political parties which have obtained at least ten per cent of the total valid ballots cast in the last election, or the political parties represented in the Turkish Grand National Assembly, or their parliamentary groups, or one sixth of all the members of the one legislative body; in cases concerning their duties and welfare, the Supreme Council of Judges, the Court of Cassation, the Council of State, the Military Court of Cassation and the universities may initiate annulment suits based on the unconstitutionality of laws, or of the by-laws of the Turkish Grand National Assembly or the specific articles or provisions thereof.

*(b) The term of litigation:*

150—The right to introduce an annulment action directly to the Constitutional Court is consummated after ninety days beginning with the promulgation of the contested law or by-laws in the Official Gazette.

*(c) The contention of unconstitutionality by other courts*

151—A court which considers unconstitutional the provisions of the relevant law or is convinced of the seriousness of the claim of unconstitutionality put forth by one of the parties, may postpone a case under consideration until the Constitutional Court decides on the matter.

If the Court doubts the seriousness of the claim of unconstitutionality, such claim shall be decided upon by the upper court of review along with the main contention.

The Constitutional Court shall decide on the matter within three months beginning from the receipt of the contention.

If no decision is reached within this period, the Court shall settle the claim of unconstitutionality according to its own conviction, and shall thus decide on the case under consideration. However, if the decision of the Constitutional Court arrives before the judgment concerning the main case is finalized, the courts shall comply therewith.

**V. The rulings of the Constitutional Court:**

152—The rulings of the Constitutional Court are final. The laws and by-laws or their provisions which have been invalidated by the Constitutional Court for unconstitutionality, shall become void from the date of the decision. The Constitutional Court may, in pertinent cases, set the date of implementation of the annulment decision. Such date may not exceed six months beginning from the date of decision.

The annulment decision is not retroactive.

The Constitutional Court may rule that its decisions based on the claims of unconstitutionality coming from other courts are restricted in scope, or binding only on the parties involved.

The decisions of the Constitutional Court shall be published immediately in the Official Gazette, and shall be binding on the legislative, executive, and judicial organs of the State, as well as on the administration, real and corporate persons.

**PART SIX***Final Provisions***I. The amendment of the Constitution:**

155—Proposals for the amendment of the Constitution may be submitted in writing by at least one-third majority of the plenary session

of the Turkish Grand National Assembly, but may not be debated with urgency. An amendment proposal shall be adopted by a two thirds majority vote of the plenary session of each legislative body.

Outside of the requirements of paragraph I, the debate and adoption of proposals for the amendment of the Constitution are subject to the provisions governing the debate and enactment of laws.

## II. Preamble and sub-titles of articles:

156—The Preamble which sets forth the basic views and principles on which this Constitution rests, is an integral part of the text of the Constitution.

The sub-titles of the articles refer only to the subjects of these articles, and their order and relationship. These sub-titles are not a part of the text of the Constitution.

## NOTE

Since 1876 Turkey has experimented four Constitutions. Article 116 of the Constitution of 1876 had provided that the Constitution could be amended if either of the House, *i.e.*, the House of Representatives or the House of Lords, proposed an amendment by two-thirds majority vote and the other House discussed and approved it by two-thirds majority vote. It was then brought to the consideration of the Emperor on whose approval the necessary law was promulgated. Under this procedure the Constitution was amended three times in 1909, 1914 and 1915.

The Constitution of 1921 had no provision for its amendment but it was amended two times. The essence of the 1923 amendment was to adopt the Republic as a form of State and the 1924 amendment adopted a provision for the amendment of the Constitution laying down the procedure that any amendment to the Constitution (a) had to be accepted for debate by a two-thirds majority of the Grand National Assembly (*i.e.* Parliament) and (b) had to be approved, after adequate discussions by the two-thirds majority of the Assembly.

The corresponding provisions of the Constitution of 1924 were:

Article 1. The Turkish State is a Republic.

Article 3. The sovereignty belong unconditionally to the Nation.

Article 4. The Grand National Assembly of Turkey is the sole representative of the nation on whose behalf it exercise the rights of sovereignty.

Article 102. Amendment of the provision of the present Constitution can be made only under the following conditions:

*(b) The term of litigation:*

150—The right to introduce an annulment action directly to the Constitutional Court is consummated after ninety days beginning with the promulgation of the contested law or by-laws in the Official Gazette.

*(c) The contention of unconstitutionality by other courts*

151—A court which considers unconstitutional the provisions of the relevant law or is convinced of the seriousness of the claim of unconstitutionality put forth by one of the parties, may postpone a case under consideration until the Constitutional Court decides on the matter.

If the Court doubts the seriousness of the claim of unconstitutionality, such claim shall be decided upon by the upper court of review along with the main contention.

The Constitutional Court shall decide on the matter within three months beginning from the receipt of the contention.

If no decision is reached within this period, the Court shall settle the claim of unconstitutionality according to its own conviction, and shall thus decide on the case under consideration. However, if the decision of the Constitutional Court arrives before the judgment concerning the main case is finalized, the courts shall comply therewith.

**V. The rulings of the Constitutional Court:**

152—The rulings of the Constitutional Court are final. The laws and by-laws or their provisions which have been invalidated by the Constitutional Court for unconstitutionality, shall become void from the date of the decision. The Constitutional Court may, in pertinent cases, set the date of implementation of the annulment decision. Such date may not exceed six months beginning from the date of decision.

The annulment decision is not retroactive.

The Constitutional Court may rule that its decisions based on the claims of unconstitutionality coming from other courts are restricted in scope, or binding only on the parties involved.

The decisions of the Constitutional Court shall be published immediately in the Official Gazette, and shall be binding on the legislative, executive, and judicial organs of the State, as well as on the administration, real and corporate persons.

**PART SIX***Final Provisions***I. The amendment of the Constitution:**

155—Proposals for the amendment of the Constitution may be submitted in writing by at least one-third majority of the plenary session

The motion for amendment must be signed by at least one-third of all the members of the Assembly.

The amendment must be supported by the vote of a majority numbering two-thirds of the total members of the Assembly.

An amendment or a modification of article 1 of the present law, stating that the form of government of the country is a Republic, cannot even be proposed under any circumstances or in any form whatsoever.

Article 103. No provision of the organic law shall be disregarded or its application suspended for any reason or under any pretext whatsoever.

No law shall contain provision contrary to the organic law.

This Constitution was amended seven times: in 1928, 1931, 1934, 1937 (twice), 1945 and 1952.

After the revolution of 1960 the present Constitution was accepted on July 9, 1961 in a referendum by the votes of 50% of the total electorate and 60% of the valid votes cast.

The Constitution has conferred rights and duties: general, social and economical, and political. The rights and duties grouped as 'social and economic' are under a qualification that 'the State shall carry out its duties to attain the social and economic goals provided in this section in so far as economic development and its financial resources permit' (article 53).

## 19. Union of South Africa

### AN ACT TO CONSTITUTE THE UNION OF SOUTH AFRICA†

(20th September, 1909)

#### Equality of English and Dutch Languages:

137. Both the English and Dutch languages shall be official languages of the Union, and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights, and privileges; all records, journals, and proceedings of Parliament shall be kept in both languages, and all Bills, Acts, and notices of general public importance or interest issued by the government of the Union shall be in both languages.

† Text of the 1909 Constitution as given in Amos J. Peaslee: *Constitutions of Nations*, 1956 and that of the 1961 Constitution as published in the 'Constitutional and Parliamentary Information'.

152. Parliament may by law repeal or alter any of the provisions of this Act: Provided that no provision thereof, for the operation of which a definite period of time is prescribed, shall during such period be repealed or altered: And provided further that no repeal or alteration of the provisions contained in this section, or in sections thirty-three and thirty-four<sup>1</sup> (until the number of members of the House of Assembly has reached the limit therein prescribed, or until a period of ten years has elapsed after the establishment of the Union, whichever is the longer period), or in sections thirty-five<sup>2</sup> and one hundred and thirty-seven, shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.

## NOTE

The Constitution did not provide for the fundamental rights except the guarantee of equality of English and Dutch languages in Section 137 and limitations on Parliament's power to prescribe qualifications of voters on grounds of race or colour and in respect of the voters of the Cape of Good Hope Province in Section 35. The Constitution was amended (some of them substituting or repealing or deleting certain clauses of the Sections) in 1920, 1925, 1926, 1927, 1933, 1934, 1935, 1936, 1940, 1941, 1942, 1942, 1945, 1946 and 1956. The amendments dealt with executive and legislative powers of the Governor-General, qualification of voters, composition of Assembly, qualification, disqualifications and allowances of the members of Parliament, Parliament's power to alter Provincial boundaries, tenure and powers of the Provincial Councils, Provincial Revenue fund, appointment of commission for delimiting the constituencies, constitution of the appellate division of the Supreme Court and its power to frame procedural rules, and the appointment and remuneration of judges. The 1956 amendment provided for the transfer of coloured voters to a separate electoral roll, deleted clauses of the Constitution which conferred right of non-discrimination on grounds of race or colour in franchise matters against the amending power, retained the clauses entrenching the equal rights of the English and Afrikaans languages and laid down (sequel to Supreme Court's judgment declaring void a law passed by the Parliament discriminating on grounds of race or colour in matters of franchise) that no court of law can declare invalid a law of the

1. Sections 33 and 34 have been repealed by Act. No. 30 of 1942.

2. Parliament's power to prescribe qualifications of voters and its limitations in respect of voters of the Cape of Good Hope Province, and on grounds of race or colour. This section was amended by Act No. 12 of 1936.

Parliament except laws altering or repealing the Sections 137 or 152 of the Constitution.

The Parliament adopted a new Constitution in 1961 and declared the Union as a Republic. Except for the change from Governor-General to President and other changes arising therefrom the Union's Constitution of 1909 as stood amended in 1961 was adopted virtually en bloc. It retained the entrenched clauses of equality of the English and Afrikaans languages but made them amendable by two-thirds majority of both the Houses sitting jointly. It has also restricted the membership of the Cabinet to 16 and of Deputy Ministers to 8. The relevant provisions are as under:

### POWERS OF PARLIAMENT

Section 59(1): Parliament shall be the sovereign legislative authority in and over the Republic, and shall have full power to make laws for the peace, order and good government of the Republic.

(2) No court of law shall be competent to enquire into or to pronounce upon the validity of any Act passed by Parliament, other than an Act which repeals or amends or purports to repeal or amend the provisions of Section 108 or 118.

#### *Part IX—General*

Section 108(1): English and Afrikaans shall be the official languages of the Republic and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights and privileges.

(2) All records, Journals and proceedings of Parliament shall be kept in both the official languages and all Bills, Acts and Notices of general public importance or interest issued by the government of the Republic shall be in both the official languages.

Section 118(1): Parliament may by law repeal or alter any of the provisions of this Act: Provided that no repeal or alteration of the provisions contained in this section or in section one hundred and eight shall be valid unless the Bill embodying such repeal or alteration is passed by the Senate and the House of Assembly sitting together, and at the third reading is agreed to by not less than two-thirds of the total number of members of the Senate and the House of Assembly.

(2) A Bill passed as aforesaid at such joint sitting shall be taken to have been duly passed by the Senate and by the House of Assembly.

This Constitution was amended in 1963 and 1965. The 1963 amendment added a sub-section to Section 108 as an exception thereto providing for recognition of one or more Bantu languages as official

When a demand is couched in general terms the Federal Assembly, if it approve thereof, will proceed to undertake the partial revision in the sense indicated in the demand, and will submit it for adoption or rejection by the people and the Cantons. If, on the contrary, it does not approve, the question whether there shall be a partial revision or not must be submitted to the vote of the people, if a majority of the Swiss citizens taking part in the vote pronounce in the affirmative, the Federal Assembly will proceed to undertake the revision in conformity with the decision of the people.

When a demand is presented in the form of a Bill complete in all details, and the Federal Assembly approves thereof, the Bill shall be submitted for adoption or rejection by the people and the Cantons. If the Federal Assembly does not approve, it may frame a Bill of its own or recommend to the people the rejection of the Bill proposed, and submit to the people its own Bill or proposal for rejection at the same time as the Bill presented by popular initiative.

122. Federal legislation shall determine the formalities to be observed in regard to popular initiative demands and to voting concerning the revision of the federal Constitution.

123. The revised federal Constitution or the revised part thereof, shall come into force when it has been accepted by a majority of the Swiss citizens taking part in the voting thereon and by a majority of the States.

In reckoning a majority of the States the vote of a half Canton is counted as half a vote. The result of the popular vote in each Canton is to be regarded as the vote of the State.

## NOTE

The Constitution does not contain a separate part devoted to declaration or guaranteeing of fundamental rights and liberties. However, they are provided differently situated in the Constitution. Some of the rights and liberties are expressed in absolute terms (articles 4, 27, 36, 57, 58 and 65), some are subject to restrictions to be imposed by law (articles 55 and 56) and others subject to restrictions on certain specified grounds (articles 31, 45, 49 and 50).

The Federal Tribunal has jurisdiction in regard to (1) conflicts of competence between Federal authorities of the one part, and Cantonal authorities of the other part; (2) disputes between Cantons, when in the sphere of public law; and (3) complaints in respect of violation of constitutional rights of citizens, and complaints by individuals in respect of concordats or treaties (article 113).



Upto 1955 the Constitution was amended no less than thirty three times (16 by way of additions, two by way of substitutions, 14 by way of modifications and one by way of deletion). Twenty amendments related to the federal legislative, executive and taxation power, three conferred additional fundamental rights and five curtailed the existing fundamental rights. Of the others one changed the election method, one related to Federal Administrative Court, one related to the composition and tenure of federal legislature and chancellery, one related to Federal-Canton financial relations and one related to the revision of the Constitution itself.

## 21. United States of America

### CONSTITUTION OF THE UNITED STATES OF AMERICA (1787)†

#### *Article V*

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by convention in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the Ninth Section of the First Article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

*Note*—The residuary legislative power vests in the States.

#### NOTE

Having stated in the Declaration of Independence, 1776 that all men are created equal, that they are endowed with certain unalienable rights, that among these are life, liberty and the pursuit of happiness, that to secure these rights governments are instituted deriving their just powers from the consent of the governed, that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government; and in the Preamble to the Constitution that it is to, *inter alia*, establish justice, promote the general welfare and secure the blessings of liberty the Constitution is ordained and established, the Constitution itself did not provide for the fundamental rights in 1787. The Bill of Rights came to be incorporated

† Text of the Constitution supplied by the U. S. Information Service, New Delhi.

in the Constitution by way of additions made pursuant to the power of amendment in article V of the original Constitution in 1791 when first ten amendments were adopted. The Ninth Amendment specifically recognised that the enumeration of these rights in the Constitution should not be construed to deny or disparage other rights retained by the people.

The Constitution although drawn in 1787, the system of Federal government under it began to function in 1789. Since then 25 amendments have been added. First ten amendments were made in 1791 to provide for the Bill of Rights. Amendments 13th, 14th, 15th, 19th, and 24th enlarged the Bill of Rights. Although 18th Amendment had taken away the freedom of trade and business so far as the manufacture, sale or transportation of intoxicating liquors for beverage purposes within and importation or exportation thereof from the United States was concerned the Twenty First Amendment repealed the 18th Amendment but provided that the transportation or importation for delivery or use of intoxicating liquors, in violation of the laws thereof is prohibited. Other eight amendments provided for the limiting of judicial power of the U.S. (11th); electoral process for the offices of the President and Vice-President (12th); empowering Congress to lay and collect taxes on incomes (16th); composition of the Senate and election of the Senators (17th); the days on which the terms of the President, Vice-President, Senators and Representatives end, and Congress summoned, and filling of the vacancy of the President's office (20th); term of President's office (22nd); representation to Capital District in Congress and Presidential and Vice-Presidential elections (23rd) and succession to the offices of the President in the case of removal, death or resignation of the President and of the Vice-President, whenever it is vacant (25th).

## 22. Brazil

### CONSTITUTION OF THE UNITED STATES OF BRAZIL, 1946†

217. The Constitution may be amended.

1. An amendment shall be considered proposed, if presented by at least one fourth of the members of the Chamber of Deputies or of the Federal Senate, or by more than one-half of the legislative assemblies of the States, in the course of two years, each of these manifesting itself by majority of its members.
2. An amendment shall be considered accepted if it be approved in two discussions by an absolute majority of the Chamber of Deputies and of the Federal Senate, in two ordinary, consecutive legislative sessions.

† Text of the Constitution as given in Amos J. Peaslee: *Constitutions of Nations*, 1956.

3. If the amendment shall obtain in one of the Chambers, in two discussions, the vote of two-thirds of its members, it shall immediately be submitted to the other, and if approved in this Chamber by the same process, and by equal majority, it shall be considered accepted.
4. The amendment shall be promulgated by the Executive Committees of the Chamber of Deputies and of the Federal Senate. After publication, over the signatures of the members of both committees shall be appended, with the respective sequence number, to the text of the Constitution.
5. The Constitution shall not be modified while a state of siege is in force.
6. Bills tending to abolish the Federation and the Republic shall not be admitted to consideration.

#### NOTE

The Constitution contained a separate chapter dealing with 'Individual rights and guarantees'. Some of the rights in article 141 are expressed in absolute term (clauses 1, 3, 4, 6, 9, 18, 19, 23, 24, 25, 26, 29, 30 and 33), some subject to restrictions imposed by law (clauses 2, 8, 10, 12, 14, 27, 28, 34 and 35) and others subject to restrictions imposed by law on certain specified grounds (clauses 5, 7, 11, 13, 15, 16, 17, 20, 21, 22, 31 and 32).

Although the Federal Supreme Court had original jurisdiction in cases respecting *inter alia* the President and other high officials, suits between the Union and the States, or between the States, it had appellate jurisdiction in cases of denial of writs of security and habeas corpus and special appellate jurisdiction in considering the constitutional validity of Federal Laws, judicial decisions and laws or acts of a local government.

Following the amending process as was laid down in article 217, the Constitution was amended in 1950, 1956 and 1961 (three times). The 1950 amendment was in respect of compensation to the judges of the Tribunal of Justice; the 1956 amendment in respect of the local administration of the Federal District; and the 1961 amendments in respect of the local administration of the Federal District, provided an additional Act setting up the parliamentary system of government in the place of presidential and related matters, and rearranged the taxation powers between the Union, States and Municipalities.

The Military regime that took over the government in April 1964 issued three Institutional Acts (in 1964, 1965 and 1966) amending certain parts of the Constitution. The Institutional Act of 1964 declared *inter alia* that the existing Constitution and the laws would continue with the modifications made by the Institutional Acts, and conferred extensive

powers on the President, authorised suspension of political rights for ten years, withdrawal of parliamentary mandate without judicial review and suspending all guarantees of life, tenure and stability in a post (Public Services) for six months. The Institutional Act of 1965 provided *inter alia* for the constitution of a Superior Military Court to try cases of crimes against national security and military institutions and President's power to extend the state of siege for a maximum period of 180 days and immunity for the acts of the Supreme Revolutionary Command and the Federal government done under the Institutional Acts. Under the Institutional Act of 1966, the President summoned the Congress to consider project for a new Constitution without making major changes in the draft. The Congress approved the Constitution in January 1967. The Constitution conferred *inter alia* greater power on the President, formed federation, provided for the indirect election to the offices of the President and Vice-President, President's power to submit Bills to the Congress and declare them laws if not passed within 30 days, suspension of the political rights of the members of the Congress on an application by the President to the Supreme Court on certain grounds, withdrawal of their mandate if their conduct becomes incompatible with their membership of the Congress and for a referendum by the President if the constitutional amendment is rejected by the Congress.

### 23. U.S.S.R.

#### CONSTITUTION OF THE UNION OF SOVIET SOCIALIST REPUBLICS (1936)†

3. All power in the U.S.S.R. belongs to the working people of town and country as represented by the Soviets of Working People's Deputies.

15. The sovereignty of the Union Republics is limited only in the spheres defined in article 14 of the Constitution of the U. S. S. R. Outside of these spheres each Union Republic exercises state authority independently. The U.S.S.R. protects the sovereign rights of the Union Republics.

146. The Constitution of the U.S.S.R. may be amended only by decision of the Supreme Soviet of the U.S.S.R. adopted by a majority of not less than two-thirds of the votes in each of its Chambers.

### 24. Uruguay

#### CONSTITUTION OF THE ORIENTAL REPUBLIC OF URUGUAY, 1951†

##### SECTION XIX, CHAPTER III—ON AMENDMENTS

331. The present Constitution may be amended, in whole or in part, in accordance with the following procedures:

(a) Upon the initiative of ten per cent of the citizens inscribed in the National Civic Register, by presenting a detailed proposal which shall

† Text of the Constitution as given in Amos J. Peaslee: *Constitutions of Nations*, 1956.

be referred to the President of the General Assembly, to be submitted for popular decision at the next election.

The General Assembly, meeting in joint session, may make substitute proposals which shall be submitted to plebiscitary decision together with the popular initiative.

(b) By proposal of amendment approved by two-fifths of the full membership of the General Assembly, presented to the President thereof, and submitted to the plebiscite at the next ensuing election.

For an affirmative result in the methods outlined in paragraphs (a) and (b), a 'yes' vote of an absolute majority of the citizens participating in the elections shall be required and this majority must represent at least thirty-five per cent of all persons inscribed in the National Civic Register.

(c) The Senators, Representatives, and the Executive Power may present proposed amendment which must be approved by an absolute majority of the full membership of the General Assembly.

A proposal which is rejected may not be renewed until the succeeding legislative period, and the same formalities must be observed.

Upon the approval of a proposal and its promulgation by the President of the General Assembly, the Executive Power, within ninety days thereafter, shall call for the election of a National Constituent Convention, which shall consider and decide upon approved proposals for amendment as well as upon any other proposals that may be presented to the Convention. The number of members of the Convention shall be double the member of legislators. Twice as many alternates shall be elected at the same time. The conditions for eligibility and the immunities and incompatibilities shall be the same as for Representatives.

The election by departmental lists shall be governed by the system of integral proportional representation and in accordance with laws in force for the election of Representatives. The Convention shall meet within one year from the date of promulgation of the proposal of amendment.

The decisions of the Convention must be taken by an absolute majority of the whole number of members of the Convention and the work of the Convention must be determined within one year from the date of its commencement. The proposal or proposals drawn up by the Convention shall be communicated to the Executive power for immediate and full publication.

The proposal or proposals drawn by the Convention must be satisfied by the body electorate convoked for the purpose by the Executive Power, on the date to be fixed by the National Constituent Convention.

Voting shall be by 'yes' or 'no' and if there are several texts of amendment, it shall be separate for each of them. For this purpose the Constituent Convention shall group together those amendments which by their nature require that they be voted on as a unit. One-third of the members of the Convention may require separate voting on one or several texts. An amendment or amendments must be approved by a majority of votes, which shall not be less than thirty-five per cent of the citizens inscribed in the National Civic Register.

In the cases contemplated by paragraphs (a) and (b), there shall be submitted for ratification by plebiscite at the same time as the next elections only those proposals which have been presented at least six months before the date of such elections, or in the first of these cases, three months before, for substitute proposals approved by the General Assembly. Proposals presented after the periods mentioned shall be submitted to plebiscite at the time of the subsequent elections.

(d) The Constitution may be amended, also, by constitutional laws which shall require for their sanction two-thirds of the full membership of each Chamber in the same legislative period. Constitutional laws may not be voted by the Executive Power and shall take effect as soon as the electorate specially convoked on the date specified in such laws shall have expressed their approval by an absolute majority of the votes cast and they shall be promulgated by the President of the General Assembly.

(e) If the Convocation of the electors for ratification of amendments, in the cases contemplated in paragraphs (a), (b), (c), and (d) coincides with any election of members of the organs of the State, the citizens must express their will on the constitutional amendments on ballots separate and apart from the election lists. Whenever the amendments submitted to plebiscite relate to election to elective offices, the voting for such offices shall be both by the system proposed and by the existing system, and the decision of the plebiscite shall be final.

## NOTE

The Constitution in a separate part has conferred not only rights and guarantees but also imposed duties. In addition, article 72 declares that the enumeration of rights, duties and guarantees does not exclude others which are inherent in human beings or which are derived from a republican form of government.

The Supreme Court is conferred with the jurisdiction to try all violators of the Constitution without exception and declare laws unconstitutional. It has original and exclusive jurisdiction in constitutional matters and any person whose direct, personal and legitimate interest is

injured and a judge, court or Administrative Tribunal hearing the proceedings may request the Supreme Court to declare on the constitutionality of the matter.

The main object of the reforms introduced by this Constitution was to replace the Presidential System of Government by a Collegiate Executive of nine, namely, National Council. This received approval in a plebiscite. In 1963 an attempt was made to amend the Constitution for introducing Presidential System of Government but the proposal was defeated in a plebiscite held coupled with the General Elections. In 1966 the National Assembly again approved the constitutional amendment for the restoration of Presidential System and submitted it to a plebiscite. The proposal was approved in the plebiscite held in 1967 coupled with the General Elections. The constitutional amendment restored Presidential System and provided *inter alia* that the executive power shall be vested in the President and Vice-President elected for five years and they would be assisted by a Council of eleven Ministers. It further empowered the Government to require Congress to vote on urgent measures within 45 days failing which they would become law.

## APPENDIX VI

### SHANKARI PRASAD DEO AND OTHERS Vs. UNION OF INDIA AND OTHERS\*

The following judgment of the Court was delivered on the 5th October, 1951 by

**Patanjali Sastri J.:** These petitions, which have been heard together, raise the common question whether the Constitution (First Amendment) Act, 1951, which was recently passed by the present provisional Parliament and purports to insert, *inter alia* articles 31A and 31B in the Constitution of India is ultra vires and unconstitutional.

2. What led to that enactment is a matter of common knowledge. The political party now in power, commanding as it does a majority of votes in the several State legislatures as well as in Parliament, carried out certain measures of agrarian reform in Bihar, Uttar Pradesh and Madhya Pradesh by enacting legislation which may compendiously be referred to as Zamindari Abolition Acts. Certain zamindars, feeling themselves aggrieved attacked the validity of those Acts in courts of law on the ground that they contravened the fundamental rights conferred on them by Part III of the Constitution. The High Court at Patna held that the Act passed in Bihar was unconstitutional while the High Courts at Allahabad and Nagpur upheld the validity of the corresponding legislation in Uttar Pradesh and Madhya Pradesh respectively. Appeals from those decisions are pending in this Court. Petitions filed in this Court by some other zamindars seeking the determination of the same question are also pending. At this stage, the Union Government, with a view to put an end to all this litigation and to remedy what they considered to be certain defects brought to light in the working of the Constitution, brought forward a bill to amend the Constitution, which, after undergoing amendments in various particulars, was passed by the requisite majority as the Constitution (First Amendment) Act, 1951, (hereinafter referred to as the Amendment Act). Swiftly reacting to this move of the Government the zamindars have brought the present petitions under article 32 of the Constitution impugning the Amendment Act itself as unconstitutional and void.



3. The main arguments advanced in support of the petitions may be summarized as follows:

First the power of amending the Constitution provided for under article 368 was conferred not on Parliament but on the two Houses of Parliament as a designated body and therefore the Provisional Parliament was not competent to exercise that power under article 379:

Secondly, assuming that the power was conferred on Parliament, it did not devolve on the Provisional Parliament, by virtue of article 379 as the words "All the powers conferred by the provisions of this Constitution on Parliament" could refer only to such powers as are capable of being exercised by the Provisional Parliament consisting of a single chamber. The power conferred by article 368 calls for the co-operative action of two Houses of Parliament and could be appropriately exercised only by the Parliament to be duly constituted under Ch. 2 of Part V:

Thirdly, the Constitution (Removal of Difficulties) Order No. 2 made by the President on 26.1.1950, in so far as it purports to adapt article 368 by omitting "either House of" and "in each House" and substituting "Parliament" for "that House" is beyond the powers conferred on him by article 392, as "any difficulties" sought to be removed by adaptation under that article must be difficulties in the actual working of the Constitution during the transitional period whose removal is necessary for carrying on the Government. No such difficulty could possibly have been experienced on the very date of the commencement of the Constitution:

Fourthly, in any case article 368 is a complete code in itself and does not provide for any amendment being made in the bill after it has been introduced in the House. The bill in the present case having been admittedly amended in several particulars during its passage through the House, the Amendment Act cannot be said to have been passed in conformity with the procedure prescribed in article 368:

Fifthly, the Amendment Act, in so far as it purports to take away or abridge the rights conferred by Part III of the Constitution, falls within the prohibition of article 13(2):

And lastly, as the newly inserted articles 31A and 31B seek to make changes in articles 132 and 136 in Ch. 4 of Part V and article 226 in Ch. 5 of Part VI, they require ratification under Cl. (B) of the proviso to article 368, and not having been so ratified, they are void and unconstitutional. They are also ultra vires as they relate to matters enumerated in List II, with respect to which the State legislatures and not Parliament have the power to make laws.

4. Before dealing with these points, it will be convenient to set out here the material portions of articles 368, 379 and 392, on the true construction of which these arguments have largely turned.

368. An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in :—

- (a) Articles 54, 55, 73, 162 or 241 or
- (b) Chapter 4 of Part V, Ch. 5 of Part VI, or Ch. 1 of Part XI, or
- (c) any of the Lists in the Seventh Schedule, or
- (d) the representation of States in Parliament, or
- (e) the provisions of this article.

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States specified in Parts A and B of the First Schedule by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

379. (1) Until both Houses of Parliament have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the body functioning as the Constituent Assembly of the Dominion of India immediately before the commencement of the Constitution shall be the Provisional Parliament and shall exercise all the powers and perform all the duties conferred by the provisions of this Constitution on Parliament.

392. (1) The President may, for the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the Government of India Act, 1935, to the provisions of this Constitution, by order direct that this Constitution shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient:

Provided that no such order shall be made after the first meeting of Parliament duly constituted under Ch. 2 of Part V.

5. On the first point, it was submitted that whenever the Constitution sought to confer a power upon Parliament, it specifically mentioned

"Parliament" as the donee of the power, as in articles 2, 3, 33, 34 and numerous other articles, but it deliberately avoided the use of that expression in article 368. Realising that the Constitution, as the fundamental law of the country, should not be liable to frequent changes according to the whim of party majorities, the framers placed special difficulties in the way of amending the Constitution and it was a part of that scheme to confer the power of amendment on a body other than the ordinary legislature, as was done by article 5 of the American Federal Constitution. We are unable to take that view. Various methods of constitutional amendment have been adopted in written constitutions, such as by referendum, by a special convention, by legislation under a special procedure, and so on. But, which of these methods the framers of the Indian Constitution have adopted must be ascertained from the relevant provisions of the Constitution itself without any leaning based on a priori grounds or the analogy of other constitutions in favour of one method in preference to another. We accordingly turn to the provisions dealing with constitutional amendments.

6. Now, the Constitution provides for three classes of amendments of its provisions. First, those that can be effected by a bare majority such as that required for the passing of any ordinary law. The amendments contemplated in articles 4, 169 and 240 fall within this class, and they are specifically excluded from the purview of article 368. Secondly, those that can be effected by a special majority as laid down in article 368. All constitutional amendments other than those referred to above come within this category and must be effected by a majority of the total membership of each House as well as by a majority of not less than two-thirds of the members of that House present and voting; and thirdly, those that require in addition to the special majority above mentioned, ratification by resolutions passed by not less than one-half of the States specified in Schedules A and B of the First Schedule. This class comprises amendments which seek to make any change in the provisions referred to in the proviso to article 368. It will be seen that the power of effecting the first class of amendments is explicitly conferred on "Parliament", that is to say, the two Houses of Parliament and the President (article 79). This could lead one to suppose, in the absence of a clear indication to the contrary, that the power of effecting the other two classes of amendments has also been conferred on the same body, namely, Parliament, for the requirement of a different majority, which is merely procedural, can by itself be no reason for entrusting the power to a different body. An examination of the language used in article 368 confirms that view.

7. In the first place, it is provided that the amendments must be initiated by the introduction of a "bill in either House of Parliament", a

familiar feature of parliamentary procedure (*cf.* article 107 (1) which says "A bill may originate in either House of Parliament"). Then, the bill must be "passed in each House"—just what Parliament does when it is called upon to exercise its normal legislative function (article 107(2)); and finally, the bill thus passed must be "presented to the President" for his "assent", again a parliamentary process through which every bill must pass before it can reach the statute-book (article 111). We thus find that each of the component units of Parliament is to play its allotted part in bringing about an amendment to the Constitution. We have already seen that Parliament effects amendments of the first class mentioned above by going through the same three fold procedure but with a simple majority. The fact that a different majority in the same body is required for effecting the second and third categories of amendments cannot make the amending agency a different body. There is no force, therefore, in the suggestion that Parliament would have been referred to specifically if that body was intended to exercise the power. Having mentioned each House of Parliament and the President separately and assigned to each its appropriate part in bringing about constitutional changes, the makers of the Constitution presumably did not think it necessary to refer to the collective designation of three units.

8. Apart from the intrinsic indications in article 368 referred to above, a convincing argument is to be found in articles 2, 3, 4, 169 and 240. As already stated, under these articles power is given to "Parliament" to make laws by a bare majority to amend certain parts of the Constitution; but in each case it is laid down that no such law should be deemed to be an amendment of the Constitution "for the purposes of article 368". It would be quite unnecessary, and indeed inappropriate, to exclude these laws from the operation of article 368, which requires a special majority, if the power to amend under the latter article was not also given to Parliament.

9. Somewhat closely allied to the point discussed above is the objection based on the bill in the present case having been passed in an amended form, and not as originally introduced. It is not correct to say that article 368 is a "complete code" in respect of the procedure provided by it. There are gaps in the procedure as to how and after what notice a bill is to be introduced, how it is to be passed by each House and how the President's assent is to be obtained. Evidently, the rules made by each House under article 118, for regulating its procedure and the conduct of its business were intended, so far as may be, to be applicable. There was some discussion at the Bar as to whether the process of amending the Constitution was a legislative process. Petitioners' counsel insisted that it was not, and that, therefore, the "legislative procedure" prescribed in article 107, which specifically provides for a bill being passed with amend-

ments, was not applicable to a bill for amending the Constitution under article 368. The argument was further supported by pointing out that if amendment of such a bill were permissible, it must be open to either House to propose and pass amendments, and in case the two Houses failed to agree, the whole machinery of article 368, would be thrown out of gear, for the joint sitting of both Houses passing the bill by a simple majority provided for in article 108 in the case of ordinary bills would be inapplicable in view of the special majority required in article 368. The argument proceeds on a misconception. Assuming that amendment of the Constitution is not legislation even where it is carried out by the ordinary legislature by passing a bill introduced for the purpose and that articles 107 to 111, cannot in terms apply when Parliament is dealing with a bill under article 368, there is no obvious reason why Parliament should not adopt, on such occasions, its own normal procedure, so far as that procedure can be followed consistently with statutory requirements. Repelling the contention that a Local Government Board conducting a statutory enquiry should have been guided by the procedure of a Court of Justice, Lord Haldane observed in *Local Government Board v. Arlidge* [(1915) A.C. 120]:

"Its (the Board's) character is that of an organisation with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended to follow the procedure which is its own and is necessary if it is to be capable of doing its work efficiently."

Those observations have application here. Having provided for the constitution of a Parliament and prescribed a certain procedure for the conduct of its ordinary legislative business to be supplemented by rules made by each House (article 118), the makers of the Constitution must be taken to have intended Parliament to follow that procedure, so far as it may be applicable, consistently with the express provisions of article 368, when they entrusted to it the power of amending the Constitution.

10. The argument that a power entrusted to a Parliament consisting of two Houses cannot be exercised under article 379 by the Provisional Parliament sitting as a single chamber overlooks the scheme of the constitutional provisions in regard to Parliament. These provisions envisage a Parliament of two Houses functioning under the Constitution framed as they have been on that basis. But the framers were well aware that such a Parliament could not be constituted till after the first elections were held under the Constitution. It thus became necessary to make provision for the carrying on, in the meantime, of the work entrusted to

Parliament under the Constitution. Accordingly, it was provided in article 379 that the Constituent Assembly should function as the Provisional Parliament during the transitional period and exercise all the powers and perform all the duties conferred by the Constitution on Parliament. Article 379 should be viewed and interpreted in the wider perspective of this scheme and not in its isolated relation to article 368 alone. The petitioners' argument that the reference in article 368 to "two Houses" makes that provision inapplicable to the Provisional Parliament would equally apply to all the provisions of the Constitution in regard to parliamentary action and, if accepted, would rob article 379 of its very purpose and meaning. It was precisely to obviate such an argument and to remove the difficulty on which it is founded and other difficulties of a like nature in working the Constitution during the transitional period that the framers of the Constitution made the further provision in article 392 conferring a general power on the President to adapt the provisions of the Constitution by suitably modifying their terms. This brings us to the construction of article 392.

11. It will be seen that the purpose for which an adaptation may be made under that article is widely expressed. It may be made for the purpose of removing "any difficulties". The particularisation of one class of difficulties which follows is illustrative and cannot have the effect of circumscribing the scope of the preceding general words. It has been urged, however, that the condition precedent to the exercise of powers under article 392 is the existence of difficulties to be removed, that is to say, difficulties actually experienced in the working of the Constitution whose removal would be necessary for carrying on the Government, such as for instance, the difficulties connected with applying articles 112, 113 etc., in the transitional period. But the argument proceeds, constitutional amendments cannot be said to be necessary during that period. Besides, amendment of the Constitution is a very serious thing, and hence, by providing that both Houses must deliberate and agree to the amendment proposed and pass the bill by a special majority, the Constitution has purposely placed difficulties in the way of amending its provisions. It would be fantastic to suppose, that after deliberately creating those difficulties, it has empowered the President to remove them by a stroke of his pen. We see no force in this line of argument. It is true enough to say that difficulties must exist before they can be removed by adaptation, but they can exist before an occasion for their removal actually arises. As already stated, difficulties are bound to arise in applying provisions, which, by their terms are applicable to a Parliament of two

have to be removed by modifying that language to fit in with the situation created by article 379. There is nothing in that article to suggest that the President should wait, before adapting a particular article, till an occasion actually arose for the Provisional Parliament to exercise the power conferred by that article. Nor is there any question here of the President removing by his adaptation any of the difficulties which the Constitution has deliberately placed in the way of its amendment. The adaptation leaves the requirement of a special majority untouched. The passing of an amendment bill by both Houses is no more a special requirement of such a bill than it is of any ordinary law made by Parliament. We are, therefore, of opinion that the adaptation of article 368 by the President was well within the powers conferred on him by article 392 and is valid and constitutional.

12. A more plausible argument was advanced in support of the contention that the Amendment Act, in so far as it purports to take away or abridge any of the fundamental rights, falls within the prohibition of article 13(2) which provides that "the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall to the extent of the contravention be void".

The argument was put thus: "The State" includes Parliament (article 12) and "law" must include a constitutional amendment. It was the deliberate intention of the framers of the Constitution, who realised the sanctity of the fundamental rights conferred by Part III, to make them immune from interference not only by ordinary laws passed by the legislatures in the country but also from constitutional amendments. It is not uncommon to find in written constitutions a declaration that certain fundamental rights conferred on the people should be "eternal and inviolate" as for instance article 11 of the Japanese Constitution. Article 5 of the American Federal Constitution provides that no amendment shall be made depriving any State without its consent "of its equal suffrage in the Senate". The framers of the Indian Constitution had the American and the Japanese models before them, and they must be taken to have prohibited even constitutional amendments in derogation of fundamental rights by using aptly wide language in article 13(2). The argument is attractive, but there are other important considerations which point to the opposite conclusion.

13. Although "law" must ordinarily include constitutional law, there is a clear demarcation between ordinary law, which is made in exercise of legislative power, and constitutional law, which is made in exercise of constituent power. Dicey defines constitutional law as including "all rules which directly or indirectly affect the distribution or the exer-

Parliament under the Constitution. Accordingly, it was provided in article 379 that the Constituent Assembly should function as the Provisional Parliament during the transitional period and exercise all the powers and perform all the duties conferred by the Constitution on Parliament. Article 379 should be viewed and interpreted in the wider perspective of this scheme and not in its isolated relation to article 368 alone. The petitioners' argument that the reference in article 368 to "two Houses" makes that provision inapplicable to the Provisional Parliament would equally apply to all the provisions of the Constitution in regard to parliamentary action and, if accepted, would rob article 379 of its very purpose and meaning. It was precisely to obviate such an argument and to remove the difficulty on which it is founded and other difficulties of a like nature in working the Constitution during the transitional period that the framers of the Constitution made the further provision in article 392 conferring a general power on the President to adapt the provisions of the Constitution by suitably modifying their terms. This brings us to the construction of article 392.

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required ratification under the proviso to article 368. The argument proceeds on a misconception. These articles so far as they are material here, run thus:

“31A. Saving of laws providing for acquisition of estates, etc.—(1) Notwithstanding anything in the foregoing provisions of this part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by any provisions of this Part:

31B. Validation of certain Acts and Regulations—Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any Court or tribunal to the contrary, each of the said Acts and Regulations shall subject to the power of any competent Legislature to repeal or amend it, continue in force.”

It will be seen that these articles do not either in terms or in effect seek to make any change in article 226 or in articles 132 and 136. Article 31A aims at saving laws providing for the compulsory acquisition by the State of a certain kind of property from the operation of article 13 read with other relevant articles in Part III, while article 31B purports to validate certain specified Acts and Regulations already passed, which, but for such a provision, would be liable to be impugned under article 13. It is not correct to say that the powers of the High Court under article 226 to issue writs ‘for the enforcement of any of the rights conferred by Part III’ or of this Court under articles 132 and 136 to entertain appeals from orders issuing or refusing such writs are in any way affected. They remain just the same as they were before: only a certain class of case has been excluded from the purview of Part III and the Courts could no longer interfere, not because their powers were curtailed in any manner or to any extent, but because there would be no occasion hereafter for the exercise of their powers in such cases.

15. The other objection that it was beyond the power of Parliament to enact the new articles is equally untenable. It was said that they related to land which was covered by Item 18 of List II of the Seventh Schedule and that the State legislatures alone had the power to legislate with respect to that matter. The answer is that, as has been stated,

cise of the sovereign power in the State." It is thus mainly concerned with the creation of the three great organs of the State, the executive, the legislature and the judiciary, the distribution of governmental power among them and the definition of their mutual relation. No doubt our constitution-makers, following the American model, have incorporated certain fundamental rights in Part III and made them immune from interference by laws made by the State. We find it, however, difficult, in the absence of a clear indication to the contrary, to suppose that they also intended to make those rights immune from constitutional amendment. We are inclined to think that they must have had in mind what is of more frequent occurrence, that is, invasion of the rights of the subjects by the legislative and the executive organs of the State by means of laws and rules made in exercise of their legislative power and not the abridgement or nullification of such rights by alterations of the Constitution itself in exercise of sovereign constituent power. That power, though it has been entrusted to Parliament, has been so hedged about with restrictions that its exercise must be difficult and rare. On the other hand, the terms of article 368 are perfectly general and empower Parliament to amend the Constitution, without any exception whatever. Had it been intended to save the fundamental rights from the operation of that provision, it would have been perfectly easy to make that intention clear by adding a proviso to that effect. In short, we have here two articles each of which is widely phrased, but conflicts in its operation with the other. Harmonious construction requires that one should be read as controlled and qualified by the other. Having regard to the considerations adverted to above, we are of opinion that in the context of article 13 "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that article 13(2) does not affect amendments made under article 368.

14. It only remains to deal with the objections particularly directed against the newly inserted articles 31A and 31B. One of these objections is based on the absence of ratification under article 368. It was said that, before these articles were inserted by the Amending Act, the High Courts had the power under article 226 of the Constitution to issue appropriate writs declaring the Zamindari Abolition Acts unconstitutional as contravening fundamental rights, and this Court could entertain appeals from the orders of the High Courts under article 132 or 136. As a matter of fact, some High Courts had exercised such powers and this Court had entertained appeals. The new articles, however, deprive the High Courts as well as this Court of the power of declaring the said Acts unconstitutional, and thereby seek to make changes in Ch. 4 of Part V and Ch. 5 of Part VI. It was, therefore, submitted that the newly inserted articles

## APPENDIX VII

### SAJJAN SINGH AND OTHERS V. THE STATE OF RAJASTHAN\*

The following judgments of the Court were delivered on the 30th October, 1964 by:

**Gajendragadkar, C. J.** (On behalf of himself, K. N. Wanchoo and Raghubar Dayal, JJ.):

These six writ petitions which have been filed under article 32 of the Constitution, seek to challenge the validity of the Constitution (17th Amendment) Act, 1964. The petitioners are affected by one or the other of the Acts added to the 9th Schedule by the impugned Act, and their contention is that the impugned Act being constitutionally invalid, the validity of the Acts by which they are affected cannot be saved. Some other parties who are similarly affected by other Acts added to the 9th Schedule by the impugned Act, have intervened at the hearing of these writ petitions, and they have joined the petitioners in contending that the impugned Act is invalid. The points raised in the present proceedings have been elaborately argued before us by Mr. Setalvad and Mr. Pathak for the interveners and Mr. Mani for the petitioners. We have also heard the Attorney-General in reply.

(2) The impugned Act consists of three sections. The first section gives its short title. Section 2(i) adds a proviso to cl. (1) of article 31A after the existing proviso. This proviso reads thus:

"Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof."

\* A.I.R. 1965 Supreme Court 845 (V 52 C 133).

articles 31A and 31B really seek to save a certain class of laws and certain specified laws already passed from the combined operation of article 13 read with other relevant articles of Part III. The new articles being thus essentially amendments of the Constitution, Parliament alone had the power of enacting them. That the laws thus saved relate to matters covered by List II does not in any way affect the position. It was said that Parliament could not validate a law which it had no power to enact. The proposition holds good where the validity of the impugned provision turns on whether the subject-matter falls within or without the jurisdiction of the legislature which passed it. But to make a law which contravenes the constitution constitutionally valid is a matter of constitutional amendment, and as such it falls within the exclusive power of Parliament. The question whether the latter part of article 31B is too widely expressed was not argued before us and we express no opinion upon it.

16. The petitions fail and are dismissed with costs.

Petitions dismissed.

those Legislatures before the Bill making provision for such amendment is presented to the President for assent".

(4) It would, thus, appear that the broad scheme of article 368 is that if Parliament proposes to amend any provision of the Constitution not enshrined in the proviso, the procedure prescribed by the main part of the article has to be followed. The Bill introduced for the purpose of making the amendment in question, has to be passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting. This requirement postulates that a bill seeking to amend the relevant provisions of the Constitution should receive substantial support from members of both the Houses. That is why a two-fold requirement has been prescribed in that behalf. After the bill is passed as aforesaid, it has to be presented to the President for his assent and when he gives his assent, the Constitution shall stand amended in accordance with the terms of the bill. That is the position in regard to the amendment of the provisions of the Constitution to which the proviso does not apply.

(5) If Parliament intends to amend any of the provisions of the Constitution which are covered by clauses (a) to (c) of the proviso, there is a further requirement which has to be satisfied before the bill can be presented to the President for his assent. Such a bill is required to be ratified by the Legislatures of not less than one-half of the States by Resolutions to that effect passed by them. In other words, in respect of the articles covered by the proviso, the further safeguard prescribed by the proviso is that the intended amendment should receive the approval of the Legislatures of not less than one-half of the States. That means that at least half of the States constituting the Union of India should by a majority vote, approve of the proposed amendment.

(6) It is obvious that the fundamental rights enshrined in Part III are not included in the proviso; and so, if Parliament intends to amend any of the provisions contained in articles 12 to 35 which are included in Part III, it is not necessary to take recourse to the proviso and to satisfy the additional requirement prescribed by it. Thus far, there is no difficulty. But in considering the scope of article 368, it is necessary to remember that article 226, which is included in Chapter V of Part VI of the Constitution, is one of the constitutional provisions which fall under cl. (b) of the proviso; and so, it is clear that if Parliament intends to amend the provisions of article 226, the bill proposing to make such an amendment must satisfy the requirements of the proviso. The question which calls for our decision is: What would be the requirement about making an amendment in a constitution provision contained in Part III, if as a result of the said amendment, the powers conferred on the High

Section 2(ii) substitutes the following sub-clause for sub-cl. (a) of cl. (2) of article 31A:—

“(a) the expression “estate” shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include—

- (i) any jagir, inam or muafi or other similar grant and in the States of Madras and Kerala, any *janmam* right;
- (ii) any land held under ryotwari settlement;
- (iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans.”

Section 3 amends the 9th Schedule by adding 44 entries to it. That is the nature of the provisions contained in the impugned Amendment Act.

(3) In dealing with the question about the validity of the impugned Act, it is necessary to consider the scope and effect of the provisions contained in article 368 of the Constitution; because a large part of the controversy in the present writ petitions turns upon the decision of the question as to what the true scope and effect of article 368 is. Let us read article 368:

“368. An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the Members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

- (a) article 54, article 55, article 73, article 162 or article 241 or
- (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
- (c) any of the Lists in the Seventh Schedule, or
- (d) the representation of States in Parliament, or
- (e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by

necessary to consider whether the proviso would cover such a case or not. If the effect of the amendment made in the fundamental rights on the powers of the High Courts prescribed by article 226, is indirect, incidental, or is otherwise of an insignificant order, it may be that the proviso will not apply. The proviso would apply where the amendment in question seeks to make any change, *inter alia*, in article 226, and the question in such a case would be: Does the amendment seek to make a change in the provisions of article 226? The answer to this question would depend upon the effect of the amendment made in the fundamental rights.

(9) In dealing with constitutional questions of this character, courts generally adopt a test which is described as the pith and substance test. In *Attorney-General for Ontario v. Reciprocal Insurers*, (1924 AC 328), the Privy Council was called upon to consider the validity of the Reciprocal Insurance Act, 1922 (12 and 13 Geo. 5, Ont., c. 62) and S. 508c which had been added to the Criminal Code of Canada by Ss. 7 and 8 Geo. 5, c. 29 Dom. Mr. Justice Duff, who spoke for the Privy Council, observed that in an enquiry like the one with which the Privy Council was concerned in that case, "it has been formally laid down in judgments of this Board, that in such an inquiry the Courts must ascertain the 'true nature and character' of the enactment": *Citizens' Insurance Co. of Canada v. Parsons*, [(1881) 7 AC 96] its "pith and substance": *Union Colliery Co. of British Columbia Ltd. v. Bryden*, (1899 AC 580); and it is the result of this investigation, not the form alone which the statute may have assumed under the hand of the draughtsman, that will determine within which of the categories of subject matters mentioned in Ss. 91 and 92 the legislation falls; and for this purpose the legislation must be 'scrutinised in its entirety': *Great West Saddlery Co. Ltd. v. The King*, (1921-2 AC 91 at p. 117): (AIR 1921 PC 148 at p. 159). It is not necessary to multiply authorities in support of the proposition that in considering the constitutional validity of the impugned Act, it would be relevant to inquire what the pith and substance of the impugned Act is. This legal position can be taken to be established by the decision of this Court which have consistently adopted the view expressed by Justice Duff, to which we have just referred.

(10) What then is the pith and substance of the impugned Act? For answering this question, it would be necessary to recall very briefly the history of articles 31A and 31B. Articles 31A and 31B were added to the Constitution with retrospective effect by S. 4 of the Constitution (First Amendment) Act, 1951. It is a matter of general knowledge that it became necessary to add these two provisions in the Constitution, because it was realised that legislative measures adopted by certain States for giving effect to the policy of agrarian reform which was accepted by

Courts under article 226 are likely to be affected? The Petitioners contend that since it appears that the powers prescribed by article 226 are likely to be affected by the intended amendment of the provisions contained in Part III, the bill introduced for the purpose of making such an amendment, must attract the proviso, and as the impugned Act has admittedly not gone through the procedure prescribed by the proviso, *it is invalid*; and that raises the question about the construction of the provisions contained in article 368 and the relation between the substantive part of article 368 with its proviso.

(7) In our opinion, the two parts of article 368 must on a reasonable construction be harmonised with each other in the sense that the scope and effect of either of them should not be allowed to be unduly reduced or enlarged. It is urged that any amendment of the fundamental rights, contained in Part III would inevitably affect the powers of the High Court, prescribed by article 226, and as such, the bill proposing the said amendment cannot fall under the proviso; otherwise the very object of not including Part III under the proviso would be defeated. When the Constitution-makers did not include Part III under the proviso, it would be reasonable to assume that they took the view that the amendment of the provisions contained in Part III was a matter which should be dealt with by Parliament under the substantive provisions of article 368 and not under the proviso. It has no doubt been suggested that the Constitution-makers perhaps did not anticipate that there would be many occasions to amend the fundamental rights guaranteed by Part III. However that may be, as a matter of construction, there is no escape from the conclusion that article 368 provides for the amendment of the provisions contained in Part III without imposing on Parliament an obligation to adopt the procedure prescribed by the proviso. It is true that as a result of the amendment of the fundamental rights, the area over which the powers prescribed by article 226 would operate may be reduced, but apparently, the Constitution-makers took the view that the diminution in the area over which the High Courts' powers under article 226 operate, would not necessarily take the case under the proviso.

(8) On the other hand, if the substantive part of article 368 is very liberally and generously construed and it is held that even substantial modification of the fundamental rights which may make a very serious and substantial inroad on the powers of the High Courts under article 226 can be made without invoking the proviso, it may deprive cl. (b) of the proviso of its substance. In other words, in construing both the parts of article 368, the rule of harmonious construction requires that if the direct effect of the amendment of fundamental rights is to make a substantial inroad on the High Courts' powers under article 226, it would become



giving effect to the agrarian policy of the party in power, were effectively challenged. For instance, in *Karimbil Kunhikoman v. State of Kerala* 1962 Supp (1) SCR 829; (AIR 1962 SC 723) the validity of the Kerala Agrarian Relations Act (IV) of 1961 was challenged by writ petitions filed under article 32, and as a result of the majority decision of this Court, the whole Act was struck down. This decision was pronounced on December 5, 1961.

(13) In *A. P. Krishnaswami Naidu v. State of Madras*, AIR 1964 SC 1515, the constitutionality of the Madras Land Reforms (Fixation of Ceiling on Land) Act (No. 58 of 1961) was put in issue, and by the decision of this Court pronounced on March 9, 1964, it was declared that the whole Act was invalid. It appears that the Rajasthan Tenancy Act, III of 1955, and the Maharashtra Agricultural Lands (Ceiling and Holdings) Act (27 of 1961) have been similarly declared invalid, and in consequence, Parliament thought it necessary to make a further amendment in article 31B so as to save the validity of these Acts which had been struck down and of other similar Acts which were likely to be struck down, if challenged. With that object in view, the impugned Act has enacted S. 3 by which 44 Acts have been added to Schedule 9. If the impugned Act is held to be valid and the amendment made in the Schedule is found to be effective, these 44 Acts would have to be treated as valid.

(14) Thus, it would be seen that the genesis of the amendments made by Parliament in 1951 by adding articles 31A and 31B to the Constitution, clearly is to assist the State Legislatures in this country to give effect to the economic policy in which the party in power passionately believes to bring about much needed agrarian reform. It is with the same object that the second amendment was made by Parliament in 1955, and as we have just indicated, the object underlying the amendment made by the impugned Act is also the same. Parliament desires that agrarian reform in a broad and comprehensive sense must be introduced in the interests of a very large section of Indian citizens who live in villages and whose financial prospects are integrally connected with the pursuit of progressive agrarian policy. Thus, if the pith and substance test is applied to the amendment made by the impugned Act, it would be clear that Parliament is seeking to amend fundamental rights solely with the object of removing any possible obstacle in the fulfilment of the socio-economic policy in which the party in power believes. If that be so, the effect of the amendment on the area over which the High Courts' powers prescribed by article 226 operate, is incidental and in the present case can be described as of an insignificant order. The impugned Act does not purport to change the provisions of article 226 and it cannot be said even to have that effect directly or in any appreciable measure. That is why we think that the

the party in power, had to face a serious challenge in the courts of law on the ground that they contravened the fundamental rights guaranteed to the citizens by Part III. These measures had been passed in Bihar, Uttar Pradesh and Madhya Pradesh, and their validity was impeached in the High Courts in the said three States. The High Court of Patna held that the relevant Bihar legislation was unconstitutional, whilst the High Courts at Allahabad and Nagpur upheld the validity of the corresponding legislative measures passed in Uttar Pradesh and Madhya Pradesh respectively. (see *Kameshwar v. State of Bihar*, AIR 1951 (Pat 91 SB) and *Surya Pal v. U.P. Government*, AIR 1951 All. 674 (FB)). The parties aggrieved by these respective decisions had filed appeals by special leave before the Supreme Court. At the same time, petitions had also been preferred before the Supreme Court under article 32 by certain other zamindars, seeking the determination of the same issues. It was at this stage that Parliament thought it necessary to avoid the delay which would necessarily have been involved in the final decision of the disputes pending before the Supreme Court, and introduced the relevant amendments in the Constitution by adding articles 31A and 31B. That was the first step taken by Parliament to assist the process of legislation to bring about agrarian reform by introducing articles 31A and 31B.

(11) The second step in the same direction was taken by Parliament in 1955 by amending article 31A by the Constitution (Fourth Amendment) Act, 1955. The object of this amendment was to widen the scope of agrarian reform and to confer on the legislative measures adopted in that behalf immunity from a possible attack that they contravened the fundamental rights of citizens. In other words, this amendment protected the legislative measures in respect of certain other items of agrarian and social welfare legislation, which affected the proprietary rights of certain citizens. That is how the second amendment was made by Parliament. At the time when the first amendment was made, article 31B expressly provided that none of the Acts and Regulations specified in the 9th Schedule, nor any of the provisions thereof, shall be deemed to be void or ever to have become void on the ground that they were inconsistent with or took away or abridged any of the rights conferred by Part III, and it added that notwithstanding any judgment decree or order of any Court or tribunal to the contrary, each of the said Acts and Regulations shall subject to the power of any competent legislature to repeal or amend, continue in force. At this time, 19 Acts were listed in Schedule 9, and they were thus effectively validated. One more Act was added to this list by the Amendment Act of 1955, so that as a result of the second amendment, the Schedule contained 20 Acts which were validated.

(12) It appears that notwithstanding these amendments, certain other legislative measures adopted by different States for the purpose of

in so doing, they have necessarily to provide for the intended validation to take effect notwithstanding any judgment, decree or order passed by a court of competent jurisdiction to the contrary. Therefore, it would be idle to contend that by making the amendment *retrospective*, the impugned Act has become constitutionally invalid.

(17-18) It has also been contended before us that in deciding the question as to whether the impugned Act falls under the proviso, we should take into account the operative words in the proviso. The proviso takes in cases where the amendment sought to be made by the relevant bill seeks to make any change in any of the articles specified in clauses (a) to (e) of the proviso, and it is urged that on a fair reading of clauses (b) and (c), it would follow that the impugned Act purports to do nothing else but to seek to amend the provisions contained in Article 226. It is not easy to appreciate the strength or validity of this argument. This argument is really based on the assumption that the legislative mechanism adopted by the Parliament in passing the impugned Act introduces this infirmity. The argument obviously assumes that it would have been open to Parliament to make appropriate changes in the different articles of Part III, such as articles 14 and 19, and if such a course had been adopted, the impugned Act would have been constitutionally valid. But inasmuch as the impugned Act purports to amend only articles 31A and 31B and seeks to add several Acts to the Ninth Schedule, it does not amend any of the provisions in Part III, but is making an independent provision, and that, it is said, must take the case within the scope of the proviso. It is clear that what the impugned Act purports to do is to amend article 31A and article 31B, itself is included in Part III. If Parliament thought that instead of adopting the cumbersome process of amending each relevant article in Part III, it would be more appropriate to add articles 31A and 31B, and on that basis it passed the material provisions of the Constitution (First Amendment) Act, it would not be reasonable to suggest that this method brings the amendment within the proviso. What the Parliament did in 1951, has afforded a valid basis for further amendments made in 1955 and now in 1964. It would be clear that though the arguments which have been urged before us in the present proceedings have been put in different forms, basically, they involve the consideration of the main question whether the impugned Act falls within the scope of the proviso or not; and the answer to this question, in our opinion, has to be against the petitioners by the application of the doctrine of pith and substance.

(19) Then, it is urged that the power to amend, which is conferred by article 368, does not include the power to take away the fundamental rights guaranteed by Part III. The contention is that the result of the

argument that the impugned Act falls under the proviso, cannot be sustained. It is an Act the object of which is to amend the relevant articles in Part III which confer fundamental rights on citizens and as such it falls under the substantive part of article 368 and does not attract the provisions of cl. (b) of the proviso. If the effect of the amendment made in the fundamental rights on article 226 is direct and not incidental and is of a very significant order, different considerations may perhaps arise. But in the present case, there is no occasion to entertain or weigh the said consideration. Therefore, the main contention raised by the petitioners and the interveners against the validity of the impugned Act must be rejected.

(15) Then, it is urged that the true purpose and object of the impugned Act is to legislate in respect of land, and legislation in respect of land falls within the jurisdiction of the State Legislatures under Entry 18 of Schedule II. The argument is that since the State Legislatures alone can make laws in respect of land, Parliament had no right to pass the impugned Act. This argument is based on the assumption that the impugned Act purports to be, and in fact, is, a piece of land legislation. The same argument is placed before us in another form. It is urged that the scheme of articles 245 and 246 of the Constitution clearly shows that Parliament has no right to make a law in respect of land, and since the impugned Act is a legislative measure in relation to land, it is invalid. This argument, in our opinion, is misconceived. In dealing with this argument, again, the pith and substance test is relevant. What the impugned Act purports to do is not to make any land legislation but to protect and validate the legislative measures in respect of agrarian reforms passed by the different State Legislatures in the country by granting them immunity from attack based on the plea that they contravene fundamental rights. Parliament, in enacting the impugned Act, was not making any provisions of land legislation. It was merely validating land legislations already passed by the State Legislatures in that behalf.

(16) It is also urged that inasmuch as the impugned Act purports in substance to set aside the decisions of courts of competent jurisdiction by which some of the Acts added to the Ninth Schedule have been declared to be invalid, it is unconstitutional. We see no substance in this argument. It is hardly necessary to emphasize that legislative power to make laws in respect of areas entrusted to the legislative jurisdiction of different legislative bodies, can be exercised both prospectively and retrospectively. The constituent power conferred by article 368 on the Parliament can also be exercised both prospectively and retrospectively. On several occasions, legislatures think it necessary to validate laws which have been declared to be invalid by courts of competent jurisdiction and

(21) It would thus appear that in substance the points urged before us in the present proceedings are really concluded by the decision of this Court in *Shankari Prasad's* case, 1952 SCR 89: (AIR 1951 SC 458) (supra). It was, however, urged before us during the course of the hearing of these writ petitions that we should reconsider the matter and review our earlier decisions in *Sankari Prasad's* case, 1952 SCR 89: (AIR 1951 SC 458). It is true that the Constitution does not place any restriction on our powers to review our earlier decisions or even to depart from them and there can be no doubt that in matters relating to the decision of constitutional points which have a significant impact on the fundamental rights of citizens, we would be prepared to review our earlier decisions in the interest of public good. The doctrine of *stare decisis* may not strictly apply in this context and no one can dispute the position that the said doctrine should not be permitted to perpetuate erroneous decisions pronounced by this Court to the detriment of general welfare. Even so, the normal principle that judgments pronounced by this Court would be final, cannot be ignored and unless considerations of a substantial and compelling character make it necessary to do so, we should be slow to doubt the correctness of previous decisions or to depart from them.

(22) It is universally recognised that in regard to a large number of constitutional problems which are brought before this Court for its decision, complex and difficult questions arise and on many of such questions, two views are possible. Therefore, if one view has been taken by this Court after mature deliberation, the fact that another Bench is inclined to take a different view may not justify the Court in reconsidering the earlier decision or in departing from it. The problem of construing constitutional provisions cannot be reasonably solved merely by adopting a literal construction of the words used in the relevant provisions. The Constitution is an organic document and it is intended to serve as a guide to the solution of changing problems which the Court may have to face from time to time. Naturally, in a progressive and dynamic society the shape and appearance of these problems are bound to change with the inevitable consequence that the relevant words used in the Constitution may also change their meaning and significance. That is what makes the task of dealing with constitutional problems dynamic rather than static. Even so, the Court should be reluctant to accede to the suggestion that its earlier decisions should be light-heartedly reviewed and departed from. In such a case the test should be; is it absolutely necessary and essential that the question already decided should be re-opened? The answer to this question would depend on the nature of the infirmity alleged in the earlier decision, its impact on public good and the validity and compelling character of the considerations urged in support of the con-

material provisions of the impugned Act is to take away a citizen's right to challenge the validity of the Acts added to the Ninth Schedule, and that means that in respect of the said Acts, the relevant fundamental rights of the citizens are taken away. We do not think there is any substance in this argument. It is true that the dictionary meaning of the word "amend" is to correct a fault or reform, but in the context, reliance on the dictionary meaning of the word is singularly inappropriate, because what article 363 authorises to be done is the amendment of the provisions of the Constitution.

It is well-known that the amendment of a law may in a proper case include the deletion of any one or more of the provisions of the law and substitution in their place of new provisions. Similarly, an amendment of the Constitution which is the subject matter of the power conferred by article 368, may include modification or change of the provisions or even an amendment which makes the said provisions inapplicable in certain cases. The power to amend in the context is a very wide power and it cannot be controlled by the literal dictionary meaning of the word "amend".

(20) The question about the validity of the Constitution (First Amendment) Act has been considered by this Court in *Shankari Prasad Singh v. Union of India* 1952 SCR 39; (AIR 1951 SC 458). In that case, the validity of the said Amendment Act was challenged on several grounds. One of the grounds was that the newly inserted articles 31-A and 31-B sought to make changes in articles 132 and 136 in Chapter IV of Part V and article 226 in Chapter V of Part VI, and so, they required ratification under cl. (b) of the proviso to article 368. This contention was rejected by this Court. Patanjali Sastri, J., as he then was, who spoke for the unanimous Court, observed that the said articles "did not either in terms or in effect seek to make any change in article 226 or in articles 132 and 136", and he added that it was not correct to say that the powers of the High Courts under article 226 to issue writs for the enforcement of any of the rights conferred by Part III or of this Court under articles 132 and 136 to entertain appeals from orders issuing or refusing to issue such writs were in any way affected. In the opinion of the Court, the said powers remained just the same as they were before; only a certain class of cases had been excluded from the purview of Part III. The fact that the courts could not exercise their powers in respect of the said class of cases, did not show that the powers of the courts were curtailed in any way or to any extent. It only meant that certain area of cases in which the said powers could have been exercised, had been withdrawn. Similarly, the argument that the amendments were invalid because they related to legislation in respect of land, was also rejected on the ground that the impugned articles 31-A and 31-B were essentially amendments of the Constitution which Parliament alone had the power to make.

would include a law passed by Parliament by virtue of its constituent power to amend the Constitution, and so, its validity will have to be tested by article 13(2), itself. It will be recalled that article 13(2) prohibits the State from making any law which takes away or abridges the rights conferred by Part III, and provides that any law made in contravention of clause (2) shall, to the extent of contravention, be void. In other words, it was urged before this Court in *Shankari Prasad's* case, 1952 SCR 89: (AIR 1951 SC 458) that in considering the question as to the validity of the relevant provisions of the Constitution (First Amendment) Act, it would be open to the party challenging the validity of the said Act to urge that in so far as the amendment Act abridges or takes away the fundamental rights of the citizens, it is void. This argument was, however, rejected by this Court on the ground that the word "law" used in article 13 "must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power with the result that article 13(2) does not affect amendments made under article 368."

(26) It is significant that Patanjali Sastri, J., as he then was, who spoke for the Court, described as attractive the argument about the applicability of article 13(2) to Constitution Amendment Acts passed under article 368 examined it closely and ultimately rejected it. It was noticed in the judgment that certain constitutions make certain rights "eternal and inviolate" and by way of illustration, reference was made to article 11 of the Japanese Constitution and article 5 of the American Federal Constitution. It was also noticed that the word "law" in its literal sense, may include constitutional law, but it was pointed out that "there is a clear demarcation between ordinary law, which is made in exercise of legislative power, and constitutional law which is made in exercise of constituent power. The scheme of the relevant provisions of the Constitution was then examined, and ultimately, the Court reached the conclusion that though both articles 13 and 368 are widely phrased, the harmonious rule of construction requires that the word "law" in article 13 should be taken to exclude law made in exercise of the constituent power.

(27) In our opinion, this conclusion is right and as we are expressing our full concurrence with the decision in *Shankari Prasad's* case, 1952 SCR 89: (AIR 1951 SC 458) we think it is necessary to indicate our reasons for agreeing with the conclusion of the Court on this point, even though the correctness of this conclusion has not been questioned before us in the course of arguments. If we had felt a real difficulty in accepting this part of the conclusion, we would have seriously considered the question as to whether the matter should not be referred to a larger Bench for a further examination of the problem.

rary view. If the said decision has been followed in a large number of cases that again is a factor which must be taken into account.

(23) In the present case, if the arguments urged by the petitioners were to prevail, it would lead to the inevitable consequence that the amendments made in the Constitution both in 1951 and 1955 would be rendered invalid and a large number of decisions dealing with the validity of the Acts included in the Ninth Schedule which have been pronounced by different High Courts ever since the decision of this Court in *Shankari Prasad's case*, 1952 SCR 89 : (AIR 1951 SC 458) was declared would also be exposed to serious jeopardy. These are considerations which are both relevant and material in dealing with the plea urged by the petitioners before us in the present proceedings that Shankari Prasad's case should be reconsidered. In view of the said plea, however, we have deliberately chosen to deal with the merits of the contentions before referring to the decision itself. In our opinion, the plea made by the petitioners for re-considering Shankari Prasad's case is wholly unjustified and must be rejected.

(24) In this connection, we would like to refer to another aspect of the matter. As we have already indicated, the principal point which has been urged before us in these proceedings is that the impugned Act is invalid for the reason that before presenting it to the President for his assent, the procedure prescribed by the proviso to article 368 has not been followed, though the Act was one which fell within the scope of the proviso. In other words, it was not disputed before us that Article 368 empowers Parliament to amend any provision of the Constitution, including the provisions in respect of the fundamental rights enshrined in Part III. The main contention was that in amending the relevant provision of the Constitution, the procedure prescribed by the proviso should have been followed. But it appears that in *Shankari Prasad's case*, 1952 SCR 89 : (AIR 1951 SC 458) (*supra*), another argument was urged before this Court in challenging the validity of the Constitution (First Amendment) Act, and since we are expressing our concurrence with the said decision, we think it is necessary to refer to the said argument and deal with it, even though this aspect of the matter has not been urged before us in the present proceedings.

(25) In *Shankari Prasad's case*, 1952 SCR 89 : (AIR 1951 SC 458) it was contended that though it may be open to Parliament to amend the provisions in respect of the fundamental rights contained in Part III, the amendment, if made in that behalf, would have to be tested in the light of the provisions contained in article 13(2) of the Constitution. The argument was that the law to which article 13(2) applies,



by the Constitution-makers when they included article 368 in the Constitution. In construing the word "law" occurring in article 13(2), it may be relevant to bear in mind that, in the words of Kania, C. J. in *A. K. Gopalan v. State of Madras*, 1950 SCR 88 at p. 100 (AIR 1950 SC 27 at p. 34) "the inclusion of article 13(1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment, to the extent it transgresses the limits, invalid."

(30) The importance and significance of the fundamental rights must obviously be recognised and in that sense, the guarantee to the citizens contained in the relevant provisions of Part III, can justly be described as the very foundation and the corner-stone of the democratic way of life ushered in this country by the Constitution. But can it be said that the fundamental rights guaranteed to the citizens are eternal and inviolate in the sense that they can never be abridged or amended? It is true that in the case of *A. K. Gopalan*, 1950 SCR 88 : (AIR 1950 S.C. 27) (supra), Patanjali Sastri, J. as he then was, expressed the view that

"there can be no doubt that the people of India have, in exercise of their sovereign will as expressed in the Preamble, adopted the democratic ideal which assures to the citizen the dignity of the individual and other cherished human values as a means to the full evolution and expression of his personality, and in delegating to the legislature, the executive and the judiciary their respective powers in the Constitution, reserved to themselves certain fundamental rights, so-called, I apprehend, because they have been retained by the people and made paramount to the delegated powers, as in the American model" (p. 198).

This hypothesis may, *prima facie* tend to show that the right to amend these fundamental rights vested not in Parliament, but in the people of India themselves. But it is significant that when the same learned Judge had occasion to consider this question more elaborately in *In re* article 143, Constitution of India and Delhi Laws Act (1912) etc., 1951 SCR 747 at pp. 883-884: (AIR 1951 SC 332 at p. 370) he has emphatically expressed the view that it is established beyond doubt that the Indian Legislature, when acting within the limits circumscribing its legislative power, has and was intended to have plenary powers of legislation as large and of the same nature as those of the British Parliament itself and no constitutional limitation on the delegation of legislative power to a subordinate unit is to be found in the Indian Councils Act, 1861, or the Government of India Act, 1935, or the Constitution of 1950. The suggestion that the Legislatures, including

(28) The first point which falls to be considered on this aspect of the matter is the construction of article 368 itself. Part XX which contains only article 368 is described as a Part dealing with the Amendment of the Constitution; and article 368 which prescribes the procedure for amendment of the Constitution, begins by saying that an amendment of this Constitution may be initiated in the manner there indicated. In our opinion, the expression "amendment of the Constitution" plainly and unambiguously means amendment of all provisions of the Constitution. It would, we think, be unreasonable to suggest that what article 368 provides is only the mechanics of the procedure to be followed in amending the Constitution without indicating which provisions of the Constitution can be amended and which cannot. Such a restrictive construction of the substantive part of article 368 would be clearly untenable. Besides, the words used in the proviso unambiguously indicate that the substantive part of the article applies to all the provisions of the Constitution. It is on that basic assumption that the proviso prescribes a specific procedure in respect of the amendment of the articles mentioned in clauses (a) to (c) thereof. Therefore, we feel no hesitation in holding that when article 368 confers on Parliament the right to amend the Constitution the power in question can be exercised over all the provisions of the Constitution. How the power should be exercised, has to be determined by reference to the question as to whether the proposed amendment falls under the substantive part of article 368, or attracts the provisions of the proviso.

(29) It is true that article 13(2) refers to any law in general, and literally construed, the word "law" may take in a law made in exercise of the constituent power conferred on Parliament; but having regard to the fact that a specific, unqualified and unambiguous power to amend the Constitution is conferred on Parliament, it would be unreasonable to hold that the word "law" in article 13(2) takes in Constitution Amendment Acts passed under article 368. If the Constitution-makers had intended that any future amendment of the provisions in regard to fundamental rights should be subject to article 13(2), they would have taken the precaution of making a clear provision in that behalf. Besides, it seems to us very unlikely that while conferring the power on Parliament to amend the Constitution, it was the intention of the Constitution-makers to exclude from that comprehensive power fundamental rights altogether. There is no doubt that if the word "law" used in article 13(2) includes a law in relation to the amendment of the Constitution, fundamental rights can never be abridged or taken away, because as soon as it is shown that the effect of the amendment is to take away or abridge fundamental rights, that portion of the law would be void under article 13(2). We have no doubt that such a position could not have been intended

(32) Apart from the fact that the words used in article 368 are clear and unambiguous in support of the view that we are taking, on principle also it appears unreasonable to suggest that the Constitution-makers wanted to provide that fundamental rights guaranteed by the Constitution should never be touched by way of amendment. It must not be forgotten that the fundamental rights guaranteed by article 19, for instance, are not absolute; the scheme of this article itself indicates that the fundamental rights guaranteed by sub-clauses (a) to (g) of clause (1) can be validly regulated in the light of the provisions contained in clauses (2) to (6) of article 19. In other words, the broad scheme of article 19 is two-fold; the fundamental rights of the citizens are of paramount importance, but even the said fundamental rights can be regulated to serve the interests of the general public or other objects mentioned respectively in clauses (2) to (6), and that means that for specified purposes indicated in these clauses, even the paramountcy of fundamental rights has to yield to some regulation as contemplated by the said clauses. It is hardly necessary to emphasise that the purposes for which fundamental rights can be regulated which are specified in clauses (2) to (6), could not have been assumed by the Constitution-makers to be static and incapable of expansion. The Constitution-makers must have anticipated that in dealing with socio-economic problems which the legislatures may have to face from time to time the concepts of public interest and other important considerations which are the basis of clauses (2) to (6) may change and may even expand; and so, it is legitimate to assume that the Constitution-makers knew that Parliament should be competent to make amendments in these rights so as to meet the challenge of the problems which may arise in the course of socio-economic progress and development of the country. That is why we think that even on principle, it would not be reasonable to proceed on the basis that the fundamental rights enshrined in Part III were intended to be finally and immutably settled and determined once for all and were beyond the reach of any future amendment.

(33) Let us illustrate this point by reference to some of the provisions of the Constitution (First Amendment) Act, 1951 itself. By this Act, articles 15, 19 and 31 were amended. One has merely to recall the purpose for which it became necessary to amend articles 15 and 19 to be satisfied that the changing character of the problems posed by the words used in the respective articles could not have been effectively met unless amendment in the relevant provisions was effected; and yet, if the argument that the fundamental rights are beyond the reach of article 368 were valid, all these amendments would be constitutionally impermissible. That, we think is not the true purport and effect of article 368. We are, therefore, satisfied that this Court was right in rejecting the said argument in the case of *Shankari Prasad*, 1952 SCR 89: (AIR 1951 SC 458) (*supra*).

the Parliament, are the delegate of the people of India in whom sovereignty vests, was rejected by the learned Judge when he observed that "the maxim 'delegatus non protest delegare' is not part of the Constitutional law of India and has no more force than a political precept to be acted upon by legislatures in the discharge of their function of making laws, and the courts cannot strike down an Act of Parliament as unconstitutional merely because Parliament decides in a particular instance to entrust its legislative power to another in whom it has confidence or, in other words, to exercise such power through its appointed instrumentality, however, repugnant such entrustment may be to the democratic process. What may be regarded as politically undesirable is constitutionally competent." It would thus appear that so far as our Constitution is concerned, it would not be possible to deal with the question about the powers of Parliament to amend the Constitution under article 368 on any theoretical concept of political science that sovereignty vests in the people and the legislatures are merely the delegate of the people. Whether or not Parliament has the power to amend the Constitution must depend solely upon the question as to whether the said power is included in article 368. The question about the reasonableness, or expediency or desirability of the amendments in question from a political point of view would be irrelevant in construing the words of article 368.

(31) Incidentally, we may also refer to the fact that the Constitution-makers had taken the precaution to indicate that some amendments should not be treated as amendments of the Constitution for the purpose of article 368. Take, for instance, article 4(2) which deals with law made by virtue of article 4(1). Article 4(2) provides that no such law shall be deemed to be an amendment of the Constitution for the purposes of article 368. Similarly, article 169(3) provides that any law in respect of the amendment of the existing legislative apparatus by the abolition or creation of Legislative Councils in States shall not be deemed to be an amendment of the Constitution for the purposes of article 368. In other words, laws falling within the purview of articles 4(2) and 169(3) need not be passed subject to the restrictions imposed by article 368, even though, in effect, they may amount to the amendment of the relevant provisions of the Constitution. If the Constitution-makers took the precaution of making this specific provision to exclude the applicability of article 368 to certain amendments, it would be reasonable to assume that they would have made a specific provision if they had intended that the fundamental rights guaranteed by Part III should be completely outside the scope of article 368.

In re. *Berubari Union and Exchange of Enclaves*, 1960-63 SCR 250: (AIR 1960 SC 845) this Court had pointed out that amendment of Article I of the Constitution consequent upon the cession of any part of the territory of India in favour of a foreign State, does not attract the safeguard prescribed by the proviso to article 368, because neither article 1 nor article 3 is included in the list of entrenched provisions of the Constitution enumerated in the proviso; and it was observed that it was not for this Court to enquire or consider whether it would not be appropriate to include the said two articles under the proviso, and that it was a matter for Parliament to consider and decide. Similarly, it seems somewhat anomalous that any amendment of the provisions contained in article 226 should fall under the proviso but not an amendment of article 32. Article 226 confers on High Courts the power to issue certain writs, while article 32, which itself is a guaranteed fundamental right, enables a citizen to move this Court for similar writs. Parliament may consider whether the anomaly which is apparent in the different modes prescribed by article 368 for amending articles 226 and 32 respectively, should not be remedied by including Part III itself in the proviso. If that is done, difficult questions as to whether the amendment made in the provisions of Part III substantially, directly and materially affects the jurisdiction and powers of the High Courts under article 226 may be easily avoided.

(37) In the result, we hold that the impugned Act is constitutionally valid. The petitions, accordingly, fail and are dismissed. There will be no order as to costs.

**Hidayatullah, J.:**

(38) I have had the privilege of reading the judgment just delivered by my lord the Chief Justice. I agree with him that there is no force in the contention that the 17th Amendment required for its valid enactment the special procedure laid down in the proviso to article 368. It would, of course, have been necessary if the amendment had sought to make a change in article 226. This eventuality cannot be said to have arisen. Article 226 remains unchanged after the amendment. The proviso comes into play only when the article is directly changed or its ambit as such is sought to be changed. What the 17th Amendment does is to enlarge the meaning of the word 'estate' in article 31-A and to give protection to some Acts passed by the State Legislatures by including them in the Ninth Schedule under the shield of article 31-B. These Acts promoted agrarian reform and but for the inclusion in the Ninth Schedule they might be assailed by the provisions of articles 14, 19 or 31 of the Constitution. Some of the Acts were in fact successfully assailed but the amendment makes them effective and invulnerable to the three articles

(34) This question can be considered from another point of view. The argument that the *fundamental rights* guaranteed by Part III are eternal, inviolate, and beyond the reach of article 368, is based on two assumptions. The first assumption is that on a fair and reasonable construction of article 368, the power to amend the fundamental rights cannot be held to be included within the constituent powers conferred on Parliament by the said article. We have already held that a fair and reasonable construction of article 368 does not justify this assumption. The other assumption which this argument makes, and must of necessity make, is that if the power to amend the fundamental rights is not included in article 368 as it stands, it cannot ever be included within its purview; because unless it is assumed that the relevant power can never be included in article 368, it would be unrealistic to propound the theory that the fundamental rights are eternal, inviolate, and not within the reach of any subsequent constitutional amendment. It is clear that article 368 itself can be amended by Parliament, though cl. (e) of the proviso requires that before amending article 368, the safeguards prescribed by the proviso must be satisfied. In other words, even if the power to amend the fundamental rights were not included in article 368, Parliament, can by a suitable amendment of article 368, take those powers. Thus, the second assumption underlying the argument about the immutable character of the fundamental rights is also not well founded.

(35) There is one more point to which we would like to refer. In the case of *Shankari Prasad*, 1952 SCR 89; (AIR 1951 SC 458) this Court has observed that the question whether the latter part of article 31B is too widely expressed, was not argued before it, and so, it did not express any opinion upon it. This question has, however, been argued before us, and so we would like to make it clear that the effect of the last clause in article 31B is to leave it open to the respective legislatures to repeal or amend the Acts which have been included in the Ninth Schedule. In other words, the fact that the said Acts have been included in the Ninth Schedule with a view to make them valid, does not mean that the legislatures in question which passed the said Acts have lost their competence to repeal them or to amend them. That is one consequence of the said provision. The other inevitable consequence of the said provision is that if a legislature amends any of the provisions contained in any of the said Acts, the amended provision would not receive the protection of article 31-B and its validity may be liable to be examined on the merits.

(36) Before we part with this matter, we would like to observe that Parliament may consider whether it would not be expedient and reasonable to include the provisions of Part III in the proviso to article 368. It is not easy to appreciate why the Constitution-makers did not include the said provisions in the proviso when article 368 was adopted.

It is true that there is no complete definition of the word "law" in the article but it is significant that the definition does not seek to exclude constitutional amendments which it would have been easy to indicate in the definition by adding "but shall not include an amendment of the Constitution". The meaning is also sought to be enlarged not curtailed. The meaning of article 13 thus depends on the sense in which the word "law" in article 13(2) is to be understood. If an amendment can be said to fall within the term "law", the Fundamental Rights become "eternal and inviolate" to borrow the language of the Japanese Constitution. Article 13 is then on par with article 5 of the American Federal Constitution in its immutable prohibition as long as it stands. But the restricted meaning given to the word "law" prevents this to be held. There is a priori reasoning without consideration of the text of the articles in Part III. The articles use the language of permanency. I am of opinion that there are indications in the Constitution which needed to be considered and I shall mention some of them later as illustrations.

(40) The next reason was that article 368 was "perfectly general" and allowed amendment of "the Constitution, without any exception whatsoever" and therefore article 13(2) did not cover a constitutional amendment. It was observed in this connection that if it was considered necessary to save Fundamental Rights a clear proviso in article 368 would have conveyed this intention without any doubt. To my mind the easiest and most obvious way was to say that the word "law" in article 13 did not include an amendment of the Constitution. It was finally concluded as follows:—

" \* \* \* In short, we have here two articles each of which is widely phrased, but conflicts in its operation with the other. Harmonious construction requires that one should be read as controlled and qualified by the other. Having regard to the considerations adverted to above, we are of opinion that in the context of article 13 "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that article 13(2) does not affect amendments made under Article 368."

(41) At the hearing reliance was not placed on article 13(2) but emphasis was laid on the amendment of article 226. Mr. R. V. S. Mani did, however, refer to the provision for the suspension of Fundamental Rights as showing that unless suspended in an emergency, Part III must stand unchanged and he referred to article 32(4). For the disposal of these cases I indicate my view that on the arguments before us I must hold that as decided in *Shankari Prasad's case*, 1952 SCR 89: (AIR

notwithstanding article 13 of the Constitution. In *Shankari Prasad's case*, 1952 SCR 89: (AIR 1951 SC 458) when the Constitution (First Amendment) Act was passed and articles 31-A and 31-B and Ninth Schedule were introduced, the effect of that amendment on Article 226 was considered and it was held that the Amendment had not the effect visualised by the Proviso to article 368. The reasoning in that case on this point applies *mutatis mutandis* to the 17th Amendment.

(39) I find, however, some difficulty in accepting a part of the reasoning in *Shankari Prasad's case*, 1952 SCR 89. (AIR 1951 SC 458) and my purpose in writing a separate judgment is to say that I decide the present cases without the assistance of that reasoning. I shall briefly indicate what that reasoning is and why I have doubts. In *Shankari Prasad's case*, 1952 SCR 89: (AIR 1951 SC 458) it was contended that by article 13(2) the Fundamental Rights in Part III of the Constitution were put beyond the reach of article 368 and outside the power of amendment conferred on Parliament by article 368. This argument was considered "attractive" but was rejected because of certain "important considerations" which it was held pointed "to the opposite conclusion". Two reasons alone appear to have weighed with this Court. The first is that as constitutional law is distinguishable from other municipal laws and as there is no "clear indication" to be found that the Fundamental Rights are "immune from Constitutional amendment" only the invasion of the Fundamental Rights by laws other than constitutional laws must be the subject of the prohibition in article 13(2). Article 13 may be quoted at this stage:

"13. Laws inconsistent with or in derogation of the fundamental rights.

- (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
- (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
- (3) In this article, unless the context otherwise requires,—
  - (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

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Perhaps, in one sense, it does not but, in another sense, it does. Our preamble is more akin in nature to the American Declaration of Independence (July 4, 1776) than to the preamble to the Constitution of the United States. It does not make any grant of power but it gives a direction and purpose to the Constitution which is reflected in Parts III and IV. Is it to be imagined that a two-thirds majority of the two Houses at any time is all that is necessary to alter it without even consulting the States? It is not even included in the proviso to article 368 and it is difficult to think that as it has not the protection of the proviso it must be within the main part of Article 368.

(43) Again, article 13(1) rendered void the laws in force in the territory of India which conflicted with Part III. Can it be said that article 13 may be repealed retrospectively and all those statutes brought back to life? Because of successive amendments we have seen many faces of article 31-A. It is for consideration whether article 13 was not intended to streamline all existing and future laws to the basic requirements of Part III. Or is the door left open for reversing the Policy of our Constitution from time to time by legislating with a bigger majority at any given time not directly but by constitutional amendments? Is it possible to justify such amendments with the aid of the provisos in article 19 which permit the making of laws restricting the freedoms but not by ignoring article 13 and relying solely on article 368?

(44) I am aware that in (1950) S.C.R. 88 at p. 100: (AIR 1950 SC 27 at p. 34) Kania, C.J. said:

“\* \* \* the inclusion of article 13(1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment to the extent it transgresses the limits invalid.”

The observation is not clear in its meaning. There was undoubtedly great purpose which this article achieves. It is probable that far from belittling the importance of article 13 the learned Chief Justice meant rather to emphasize the importance and the commanding position of Fundamental Rights in that even without article 13 they would have the same effect on other laws. To hold that article 13 is framed merely by way of abundant caution, and serves no additional or intrinsic function of its own, might, by analogy persuade us to say the same of article 32(1) because this Court would do its duty under article 32(2) even in the absence of the guarantee.

1951 SC 458), article 226 is not sought to be changed by the 17th Amendment. But I make it clear that I must not be understood to have subscribed to the view that the word "law" in article 13(2) does not control constitutional amendments. I reserve my opinion on that case for I apprehend that it depends on how wide is the word "law" in that article. The prohibition in that article may have to be read in the light of declarations in the various articles in Part III to find out the proper meaning. Though I do not express a final opinion I give a few examples. Take for instance article 32. It reads:

"32. Remedies for enforcement of rights.

- (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed.
- (2) The Supreme Court shall have power to issue directions or orders or writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
- (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
- (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by the Constitution."

It is *prima facie* at least, reasonable to think that if cls. (1) and (4) of this article were included in Part XX (Amendment of the Constitution) that would have made the guarantee absolute against any amendment. It is a matter for consideration whether this guarantee is any the less because the article is in another Part. The first clause assures a guaranteed remedy. That guarantee is equally against legislative and executive actions. Part III is full of declarations of what the legislature can do and what it cannot do. The guarantee covers all those actions which are not open to the legislature and the executive. If it be held that the guarantee is inviolable would not the guarantee of the remedy make the rights equally protected?

(42) Another provision, namely, the Preamble of the Constitution is equally vital to our body politic. In (1960) 3 SCR 250: (AIR 1960 SC 845) it is held that although the preamble is the key to the mind of the Constitution-makers, it does not form part of the Constitution.

majority. To hold this would mean *prima facie* that the most solemn parts of our Constitution stand on the same footing as any other provision and even on a less firm ground than that on which the articles mentioned in the proviso stand. The anomaly that article 226 should be somewhat protected but not article 32 must give us pause. Article 32 does not erect a shield against private conduct but against State conduct including the legislatures (see article 12). Can the legislature take away this shield? Perhaps by adopting a literal construction of article 368 one can say that. But I am not inclined to play a grammarian's role. As at present advised I can only say that the power to make amendments ought not ordinarily to be a means of escape from absolute constitutional restrictions.

(48) For these reasons though I agree with the order proposed I would not like to be understood to have expressed a final opinion on the aspect of the case outlined above.

Mudholkar, J.

(49) I have seen the judgments of my Lord the Chief Justice and my brother Hidayatullah and I agree that the Writ Petitions should be dismissed.

(50) Of the various contentions raised in 1952 SCR 89 (AIR 1951 SC 458) in which the Constitution (First Amendment) Act, 1951 was challenged before this Court only two would be relevant in the context of the Constitution (Seventeenth Amendment) Act 1964. They are (a) whether the Amendment Act in so far as it purports to take away or abridge the rights conferred by Part III of the Constitution falls within the prohibition of article 13(2) and (b) whether articles 31 A and 31 B seek to make changes in articles 132, 136 or 226 or in any of the Lists in the Seventh Schedule and therefore, the requirements of the proviso to article 368 had to be satisfied. Both these contentions were negatived by this Court. The first contention has not been raised in the arguments before us and the attack on the Seventeenth Amendment Act was based only on the second contention. Most of the grounds which learned counsel urged before us were the same as those urged in the earlier case. Some additional arguments were also urged before us but as my Lord the Chief Justice has pointed out they are unsubstantial. An attempt was made by Mr. Mami learned counsel for the petitioners to persuade us to reconsider the decision in the earlier case with regard to the second contention. As, however, no case was made out by him for reconsideration of that decision we intimated to him that we do not propose to reconsider it.

(51) Since my Lord the Chief Justice in his judgment has dealt with the first contention also and expressed the view that the previous

(45) I would require stronger reasons than those given in *Shankari Prasad's* case, 1952 SCR 89: (AIR 1951 SC 458) to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without the concurrence of the States. No doubt article 19 by clauses numbered 2 to 6 allows a curtailment of rights in the public interest. This shows that Part III is not static. It visualises change and progress but at the same time it preserves the individual rights. There is hardly any measure of reform which cannot be introduced reasonably, the guarantee of individual liberty notwithstanding. Even the agrarian reforms could have been partly carried out without articles 31-A and 31-B but they would have cost more to the public exchequer. The rights of society are made paramount and they are placed above those of the individual. This is as it should be. But restricting the Fundamental Rights by resort to cls. 2 to 6 of article 19 is one thing and removing the rights from the Constitution or debilitating them by an amendment is quite another. This is the implication of *Shankari Prasad's* case, 1952 SCR 89: (AIR 1951 SC 458). It is true that such things would never be, but one is concerned to know if such a doing would be possible.

(46) It may be said that the words of article 368 are quite explicit. Article 368 does not give power to amend "any provision" of the Constitution. At least the article does not say so. Analysed by the accepted canons of interpretation it is found to lay down the manner of the amendment of "this Constitution" but by "this Constitution" it does not mean each individual article wherever found and whatever its language and spirit. The Constitution itself indicates in some places a contrary intention expressly (*See* articles 4, 169 and the former article 240) and in some others by implication (*See* article 11). What article 368 does is to lay down the manner of amendment and the necessary conditions for the effectiveness of the amendment. The contrast between the opening part and the proviso does not show that what is outside the proviso is necessarily within the powers of amendment. The proviso merely puts outside the exclusive power of Parliament to amend those provisions on which our federal structure rests. It makes it incumbent that a majority of the States should also agree. The proviso also preserves the structure of the higher judiciary so vital to a written Constitution and to a Democracy such as ours. But the article nowhere says that the preamble and every single article of the Constitution can be amended by two-thirds majority despite any permanency in the language and despite any historical fact or sentiment.

(47) The Constitution gives so many assurances in Part III that it would be difficult to think that they were the play things of a special

said that fundamental rights are those rights which the people have reserved for themselves that learned Judge has emphatically stated in 1951 SCR 747: (AIR 1951 SC 332) that Parliament, acting within the limits of its legislative power, has plenary powers of legislation which are as large and which are of the same nature as those of the British Parliament and rejected the suggestion that Parliament is the delegate of the people in whom sovereignty rests. But does it follow that the learned Judge has departed from his earlier view? No reference was made by him in *Shankari Prasad's* case, 1952 SCR 89: (AIR 1951 SC 458) to his observations though they needed to be explained. In the *Delhi Laws Act* case, 1951 SCR 747: (AIR 1951 SC 332) he has undoubtedly said that Parliament enjoys plenary powers of legislation. That Parliament has plenary powers of legislation within the circumscribed limits of its legislative power and cannot be regarded as a delegate of the people while exercising its legislative powers is a well accepted position. The fact, however, remains that unlike the British Parliament our Parliament like every other organ of the State, can function only within the limits of the powers which the Constitution has conferred upon it. This would also be so when, in the exercise of its legislative power, it makes an amendment to the Constitution or to any of its provisions. It would, therefore, appear that the earlier observation of Patanjali Sastri, J., cannot be regarded as inconsistent with what he has said in the *Delhi Laws Act* case, 1951 SCR 747: (AIR 1951 SC 332). At any rate, this is an aspect of the matter which requires further consideration, particularly because the same learned Judge has not adverted to those observations in *Shankari Prasad's* case. It is true that by virtue of S. 8 of the Indian Independence Act, 1947 it was upon the Constituent Assembly which framed the Constitution and not upon the people of India that sovereignty devolved after the withdrawal of the British power. But both the "Objectives Resolution" adopted by the Constituent Assembly on January 22, 1947 and the Preamble to the Constitution show that this sovereign body framed the Constitution in the name of the people of India and by virtue of the powers derived from them. In the circumstances it would have to be considered whether Patanjali Sastri J., was not right in saying that the fundamental rights are the minimum rights reserved by the people to themselves and they are, therefore, unalterable.

(56) It is true that the Constitution does not directly prohibit the amendment of Part III. But it would indeed be strange that rights which are considered to be fundamental and which include one which is guaranteed by the Constitution (vide article 32) should be more easily capable of being abridged or restricted than any of the matters referred to in the proviso to article 368 some of which are perhaps less vital than fundamental rights. It is possible, as suggested by my

decision is right I think it necessary to say, partly for the reasons stated by my learned brother Hidayatullah and partly for some other reasons, that I would reserve my opinion on this question and that I do not regard what this Court has held in that case as the last word.

(52) It seems to me that in taking the view that the word "law" occurring in article 13(2) of the Constitution, includes an amendment to the Constitution this Court has not borne in mind some important considerations which would be relevant for the purpose. The language of article 368 is plain enough to show that the action of Parliament in amending the Constitution is a legislative act like one in exercise of its normal legislative power. The only difference in respect of an amendment to the Constitution is that the Bill amending of the Constitution has to be passed by a special majority (here I have in mind only those amendments which do not attract the proviso to article 368). The result of a legislative action of a legislature cannot be other than "law" and, therefore, it seems to me that the fact that the legislation deals with the amendment of a provision of the Constitution would not make its result any the less a law. Article 368 does not say that when Parliament makes an amendment to the Constitution it assumes a different capacity, that of a constituent body. As suggested by my learned brother Hidayatullah it is open to doubt whether this article confers any such power upon Parliament. But even assuming that it does, it can only be regarded as an additional legislative power.

(53) Then again while the Constitution as originally framed can only be interpreted by a court of law and the validity of no provision therein can be challenged, the same cannot be said of an amendment to the Constitution. For an amendment to be treated as a part of the Constitution it must in fact and in law have become part of the Constitution. Whether it has become a part of the Constitution is thus a question open to judicial review. It is obvious that an amendment must comply with the requirements of the Constitution and should not transgress any of its provisions. Where, therefore a challenge is made before the Court on the ground that no amendment had in fact been made or on the ground that it was not a valid amendment it will be both the duty of the Court as well as be and within its power to examine the question and to pronounce upon it. This is precisely what a court is competent to do in regard to any other law, the validity of which is impugned before it.

(54) Neither of these matters appears to have been considered in *Shankari Prasad's case*, 1952 SCR 89: (AIR 1951 SC 458) and I think that they do merit consideration.

(55) My Lord the Chief Justice has observed that though in 1950 SCR 88: (AIR 1950 SC 27) Patanjali Sastri, J., (as he then was) has

Constitution. On the other hand under article 368 a procedure is prescribed for amending the Constitution. If upon a literal interpretation of this provision an amendment even of the basic features of the Constitution would be possible it will be a question for consideration as to how to harmonise the duty of allegiance to the Constitution with the power to make an amendment to it. Could the two be harmonised by excluding from the procedure for amendment, alteration of a basic feature of the Constitution? It would be of interest to mention that the Supreme Court of Pakistan has, in *Fazlul Quader Chowdhry v. Mohd. Abdul Haque* [1963 PLD 486 (SC)] held that franchise and form of government are fundamental features of a Constitution and the power conferred upon the President by the Constitution of Pakistan to remove difficulties does not extend to making an alteration in a fundamental feature of the Constitution. For striking down the action of the President under, what he calls 'sub-constitutional power', Cornelius C. J., relied on the Judges' oath of office. After quoting the following passage from Cooley's "Constitutional Limitations":

"For the constitution of the State is higher in authority than any law, direction, or order made by anybody or any officer assuming to act under it since such body or officer must exercise a delegated authority, and one that must necessarily be subservient to the instrument by which the delegation is made. In any case of conflict the fundamental law must govern, and the act in conflict with it must be treated as of no legal validity."

the learned Chief Justice observed:

"To decide upon the question of constitutional validity in relation to an act of a statutory authority, how-high-so-ever, is a duty devolving ordinarily upon the superior Courts by virtue of their office, and in the absence of any bar either express or implied which stands in the way of that duty being performed in respect of the Order here in question it is a responsibility which cannot be avoided". (p. 506)

The observations and the passage from Cooley, quoted here for convenience support what I have said earlier regarding the power of the Courts to pronounce upon the validity of amendments to the Constitution.

(60) The Constitution indicates three modes of amendments and assuming that the provisions of article 368 confer power on Parliament to amend the Constitution, it will still have to be considered whether as long as the Preamble stands unamended, that power can be exercised with respect to any of the basic features of the Constitution.

(61) To illustrate my point, as long as the words 'sovereign democratic republic' are there, could the Constitution be amended so as to depart from the democratic form of Government or its republic character?

that upon the arguments advanced before us no case has been made out for striking down the Seventeenth Amendment.

(65) As indicated in the judgment of my Lord the Chief Justice an amendment made by resort to the first part of article 368 could be struck down upon a ground such as taking away the jurisdiction of the High Courts under article 226 or of this Court under article 136 without complying with the requirements of the proviso. To this I would like to add that if the effect of an amendment is to curtail substantially, though indirectly, the jurisdiction of High Courts under article 226 or of this Court under article 136 and recourse has not been had to the proviso to article 368 the question whether the amendment was a colourable exercise of power by Parliament will be relevant for consideration.

(66) Before I part with this case I wish to make it clear that what I have said in this judgment is not an expression of my final opinion but only an expression of certain doubts which have assailed me regarding a question of paramount importance to the citizens of our country: to know whether the basic features of the Constitution under which we live and to which we owe allegiance are to endure for all time—or at least for the foreseeable future—or whether they are no more enduring than the implemental and subordinate provisions of the Constitution.



If that cannot be done, then, as long as the words "Justice, social, economic and political etc.", are there could any of the rights enumerated in articles 14 to 19, 21, 25, 31 and 32 be taken away? If they cannot, it will be for consideration whether they can be modified.

(62) It has been said, no doubt, that the Preamble is not a part of our Constitution. But, I think, that if upon a comparison of the Preamble with the broad features of the Constitution it would appear that the Preamble is an epitome of those features or, to put it differently if these features are an amplification or concretisation of the concepts set out in the Preamble it may have to be considered whether the Preamble is not a part of the Constitution. While considering this question it would be of relevance to bear in mind that the Preamble is not of the common run such as is to be found in an Act of a legislature. It has the stamp of deep deliberation and is marked by precision. Would this not suggest that the framers of the Constitution attached special significance to it?

(63) In view of these considerations and those mentioned by my learned brother Hidayatullah I feel reluctant to express a definite opinion on the question whether the word 'law' in article 13(2) of the Constitution excludes an Act of Parliament amending the Constitution and also whether it is competent to Parliament to make any amendment at all to Part III of the Constitution.

(64) In so far as the second contention is concerned I generally agree with what my Lord the Chief Justice has said but would only like to add this: Upon the assumption that Parliament can amend Part III of the Constitution and was, therefore, competent to enact therein articles 31A and 31B as also to amend the definition of 'estate' the question still remains whether it could validate a State law dealing with land. I take it that only that legislature has power to validate a law which has the power to enact that law. Since the agrarian laws included in the Ninth Schedule and sought to be protected by article 31B could not have been enacted by Parliament would it be right to say that Parliament could validate them? If Parliament could amend Part III it could indeed, remove the impediment in the way of the State Legislatures by enacting article 31A and amending the definition of 'estate'. But could it go to the extent it went when it enacted the First Amendment Act and the Ninth Schedule and has now added 44 more agrarian laws to it? Or was it incompetent to it to go beyond enacting article 31A in 1950 and now beyond amending the definition of estate? This, however, does not appear to have been considered in *Shankari Prasad's* case, 1952 SCR 89; (AIR 1951 SC 458) nor was such an argument advanced before us in this case. I am only mentioning this to make it clear that even in so far as the second contention is concerned I base my decision on the narrow ground

of 1953, read with S. 10 B thereof. The petitioners, alleging that the relevant provisions of the said Act whereunder the said area was declared surplus were void on the ground that they infringed their rights under cls. (f) and (g) of article 19 and article 14 of the Constitution, filed a writ in this Court under article 32 of the Constitution for a direction that the Constitution (First Amendment) Act, 1951, Constitution (Fourth Amendment) Act, 1955, Constitution (Seventeenth Amendment) Act, 1964, insofar as they affected their fundamental rights were unconstitutional and inoperative and for a direction that S. 10-B of the said Act X of 1953 was void as violative of articles 14 and 19 (1) (f) and (g) of the Constitution.

(3) Writ Petitions Nos. 202 and 203 of 1966 were filed by different petitioners under article 32 of the Constitution for a declaration that the Mysore Land Reforms Act (Act 10 of 1962) as amended by Act 14 of 1965, which fixed ceilings on land holdings and conferred ownership of surplus lands on tenants infringed articles 14, 19 and 31 of the Constitution and, therefore, was unconstitutional and void.

(4) The States of Punjab and Mysore, *inter alia* contended that the said Acts were saved from attack on the ground that they infringed the fundamental rights of the petitioners by reason of the Constitution (Seventeenth Amendment) Act, 1964, which, by amending article 31-A of the Constitution and including the said two Acts in the 9th Schedule thereto, had placed them beyond attack.

(5) In Writ Petition No. 153 of 1966, 7 parties intervened. In Writ Petition No. 202 of 1966 one party intervened. In addition, in the first petition, notice was given to the Advocates-General of various States. All the learned counsel appearing for the parties, the Advocates-General appearing for the States and the learned counsel for the interveners have placed their respective view points exhaustively before us. We are indebted to all of them for their thorough preparation and clear exposition of the difficult questions of law that were raised in the said petitions.

(6) At the outset it would be convenient to place briefly the respective contentions under different heads: (1) The Constitution is intended to be permanent and, therefore, it cannot be amended in a way which would injure, maim or destroy its indestructible character. (2) The word "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed and it cannot be so construed as to enable the Parliament to destroy the permanent character of the Constitution. (3) The fundamental rights are a part of the basic structure of the Constitution and, therefore, the said power can be exercised only to preserve rather than destroy the essence of those rights. (4) The limits on

## APPENDIX VIII

### I. C. GOLAK NATH V. STATE OF PUNJAB\*

- (1) I. C. Golak Nath and Others

V.

The State of Punjab and Another

(Writ Petition No. 153 of 1966—

Under Article 32 of the Constitution)

- (2) N. Krishna Bhatta

V.

The State of Mysore and Another

(Writ Petition No. 202 of 1966—

Under Article 32 of the Constitution)

- (3) P. Ramakrishna Mally

V.

The State of Mysore and Another

(Writ Petition No. 205 of 1966—

Under Article 32 of the Constitution)

The following judgments of the Court were delivered on the 27th February, 1967 by:

**K. Subba Rao, C.J.** (on behalf of himself, J.C. Shah, S.M. Sikri, J.M. Shelat and C. A. Vaidialingam, JJ.): These three Writ Petitions raised an important question of the validity of the Constitution (Seventeenth Amendment) Act, 1964.

(2) Writ Petition No. 153 of 1966 is filed by the petitioners therein against the State of Punjab and the Financial Commissioner, Punjab. The petitioners are the son, daughter and grand-daughters of one Henry Golak Nath, who died on July 30, 1953. The Financial Commissioner, in revision against the order made by the Additional Commissioner, Jullundur Division, held by an order dated January 22, 1962 that an area of 418 standard acres and 9½ units was surplus in the hands of the petitioners under the provisions of the Punjab Security of Land Tenures Act X

\* AIR 1967 Supreme Court 1643 (V 54 C 342).

article 368 are clear and unequivocal and there is no scope for invoking implied limitations on that power: further the doctrine of implied power has been rejected by the American Courts and jurists. (4) The object of the amending clause in a flexible Constitution is to enable the Parliament to amend the Constitution in order to express the will of the people according to the changing course of events and if amending power is restricted by implied limitations, the Constitution itself might be destroyed by revolution. Indeed, it is a safety valve and an alternative for a violent change by revolution. (5) There are no basic and non-basic features of the Constitution; everything in the Constitution is basic and it can be amended in order to help the future growth and progress of the country. (6) Debates in the Constituent Assembly cannot be relied upon for construing article 368 of the Constitution and even if they can be, there is nothing in the debates to prove positively that fundamental rights were excluded from amendment. (7) Most of the amendments are made out of political necessity, they involve questions, such as, how to exercise power, how to make the lot of the citizens better and the like and, therefore, not being judicial questions, they are outside the Court's jurisdiction. (8) The language of article 368 is clear, categorical, imperative and universal; on the other hand, the language of article 13(2) is such as to admit qualifications or limitations and, therefore, the Court must construe them in such a manner as that article could not control article 368. (9) In order to enforce the Directive Principles the Constitution was amended from time to time and the great fabric of the Indian Union has been built since 1950 on the basis that the Constitution could be amended and, therefore, any reversal of the previous decisions would introduce economic chaos in our country and that, therefore, the burden is very heavy upon the petitioners to establish that the fundamental rights cannot be amended under article 368 of the Constitution. (10) Article 31-A and the 9th Schedule do not affect the power of the High Court under article 226 or the legislative power of the States though the area of their operation is limited and, therefore, they do not fall within the scope of the proviso to article 368.

(9) *The aforesaid contentions only represent a brief summary of the elaborate arguments advanced by learned counsel. We shall deal in appropriate context with the other points mooted before us.*

(10) It will be convenient to read the material provisions of the Constitution at this stage.

*Article 13(1)*

\* \* \*

(2) The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

the power to amend are implied in article 368, for the expression "amend" has a limited meaning. The wide phraseology used in the Constitution in other articles, such as "repeal" and "re-enact" indicates that article 368 only enables a modification of the articles, within the framework of the Constitution and not a destruction of them. (5) The debates in the Constituent Assembly, particularly the speech of Mr. Jawahar Lal Nehru, the first Prime Minister of India, and the reply of Dr. Ambedkar, who piloted the Bill, disclose clearly that it was never the intention of the makers of the Constitution by putting in article 368 to enable the Parliament to repeal the fundamental rights, the circumstances under which the amendment moved by Mr. H. V. Kamath, one of the members of Constituent Assembly, was withdrawn and article 368 was finally adopted, support the contention that amendment of Part III is outside the scope of article 368. (6) Part III of the Constitution is a self-contained Code and its provisions are elastic enough to meet all reasonable requirements of changing situations. (7) The power to amend is sought to be derived from three sources, namely, (i) by implication under article 368 itself; the procedure to amend culminating in the amendment of the Constitution necessarily implies that power, (ii) the power and the limits of the power to amend are implied in the articles sought to be amended, and (iii) article 368 only lays down the procedure to amend, but the power to amend is only the legislative power conferred on the Parliament under articles 245, 246 and 248 of the Constitution. (8) The definition of 'law' in article 13(2) of the Constitution includes every branch of law, statutory, constitutional, etc., and therefore, the power to amend in whichever branch it may be classified, if it takes away or abridges fundamental rights would be void thereunder. (9) The impugned amendment detracts from the jurisdiction of the High Court under article 226 of the Constitution and also the legislative powers of the States and, therefore, it falls within the scope of the proviso to article 368.

(7) The said summary, though not exhaustive, broadly gives the various nuances of the contentions raised by the learned counsel, who question the validity of the 17th Amendment. We have not noticed the other argument of Mr. Nambiar, which are peculiar to the Writ Petition No. 153 of 1966 as those questions do not arise for decision, in the view we are taking on the common questions.

(8) On behalf of the Union and the States the following points were pressed: (1) A constitutional amendment is made in exercise of the sovereign power and not legislative power of Parliament and, therefore, it partakes the quality and character of the Constitution itself. (2) The real distinction is between a rigid and a flexible Constitution. The distinction is based upon the express limits of the amending power. (3) The provisions of

article 368 are clear and unequivocal and there is no scope for invoking implied limitations on that power: further the doctrine of implied power has been rejected by the American Courts and jurists. (4) The object of the amending clause in a flexible Constitution is to enable the Parliament to amend the Constitution in order to express the will of the people according to the changing course of events and if amending power is restricted by implied limitations, the Constitution itself might be destroyed by revolution. Indeed, it is a safety valve and an alternative for a violent change by revolution. (5) There are no basic and non-basic features of the Constitution; everything in the Constitution is basic and it can be amended in order to help the future growth and progress of the country. (6) Debates in the Constituent Assembly cannot be relied upon for construing article 368 of the Constitution and even if they can be, there is nothing in the debates to prove positively that fundamental rights were excluded from amendment. (7) Most of the amendments are made out of political necessity, they involve questions, such as, how to exercise power, how to make the lot of the citizens better and the like and, therefore, not being judicial questions, they are outside the Court's jurisdiction. (8) The language of article 368 is clear, categorical, imperative and universal; on the other hand, the language of article 13(2) is such as to admit qualifications or limitations and, therefore, the Court must construe them in such a manner as that article could not control article 368. (9) In order to enforce the Directive Principles the Constitution was amended from time to time and the great fabric of the Indian Union has been built since 1950 on the basis that the Constitution could be amended and, therefore, any reversal of the previous decisions would introduce economic chaos in our country and that, therefore, the burden is very heavy upon the petitioners to establish that the fundamental rights cannot be amended under article 368 of the Constitution. (10) Article 31-A and the 9th Schedule do not affect the power of the High Court under article 226 or the legislative power of the States though the area of their operation is limited and, therefore, they do not fall within the scope of the proviso to article 368.

(9) The aforesaid contentions only represent a brief summary of the elaborate arguments advanced by learned counsel. We shall deal in appropriate context with the other points mooted before us.

(10) It will be convenient to read the material provisions of the Constitution at this stage.

#### *Article 13(1)*

(2) The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,

(a) 'law' include any ordinance, order, bye law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

*Article 31-A(1)* Notwithstanding anything contained in article 13, no law providing for,

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31.

(2) (a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenure in force in that area and shall also include

\* \* \* \*

(ii) any land held under ryotwari settlement,

(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto...

*Article 31-B.* Without prejudice to the generality of the provisions contained in article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with or takes away or abridges any of the rights conferred by, any provisions of this Part and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

In the Ninth Schedule to the Constitution the Mysore Land Reforms Act, 1961 (Mysore Act X of 1962) is included as item 51 and the Punjab Security of Land Tenures Act, 1953 (Punjab Act X of 1953) is included as item 54. The definition of "estate" was amended and the Ninth Schedule was amended by including therein the said two Acts by the Constitution (Seventeenth Amendment) Act, 1964.

(11) The result of the said amendments is that both the said Acts dealing with estates, within their wide definition introduced by the Constitution (Seventeenth Amendment) Act, 1964, having been included

in the Ninth Schedule, are placed beyond any attack on the ground that their provisions are inconsistent with or take away or abridge any of the rights conferred by Part III of the Constitution. It is common case that if the Constitution (Seventeenth Amendment) Act 1964 was constitutionally valid the said Acts could not be impugned on any of the said grounds.

(12) The question of the amendability of the fundamental rights was considered by this Court earlier in two decisions, namely, *Shankari Prasad Singh v Union of India*<sup>1</sup> and in *Sajjan Singh v State of Rajasthan*<sup>2</sup>

(13) In the former, the validity of the Constitution (First Amendment) Act 1951 which inserted, *inter alia*, articles 31-A and 31-B in the Constitution was questioned. That amendment was made under article 368 of the Constitution by the Provisional Parliament. This Court held that Parliament had power to amend Part III of the Constitution. The Court came to that conclusion on two grounds, namely, (1) the word "Law" in article 13(2) was one made in exercise of legislative power and not constitutional law made in exercise of constituent power; and (ii) there were two articles [articles 13(2) and 368] each of which was widely phrased and therefore, harmonious construction required that one should be so read, as to be controlled and qualified by the other, and having regard to the circumstances mentioned in the judgment article 13 must be read subject to article 368. A careful perusal of the judgment indicates that the whole decision turned upon an assumption that the expression "law" in article 13(2) does not include constitutional law and on that assumption an attempt was made to harmonise articles 13(2) and 368 of the Constitution.

(14) The decision in *Sajjan Singh* case, 1962, 1 SCR 933 (AIR 1965 SC 845) (supra) was given in the context of the question of the validity of the Constitution (Seventeenth Amendment) Act 1964. Two questions arose in that case: (1) Whether the amendment Act insofar it purported to take away or abridge the rights conferred by Part III of the Constitution fell within the prohibition of Article 13(2) and (2) whether articles 31-A and 31-B sought to make changes in articles 132, 136 or 226 or in any of lists in the Seventh Schedule and therefore the requirements of the proviso to article 368 had to be satisfied. Both the Chief Justice and Mudholkar, J. made it clear that the first contention was not raised before the Court. The learned counsel appearing for both the parties accepted the correctness of the decision in *Shankari Prasad* case.

<sup>1</sup> AIR 1951 SC 458 at p 463

<sup>2</sup> AIR 1955 SC 845 at pp 853, 856, 860, 861, 862-63. [137]



in that regard. Yet Gajendragadkar, C.J. speaking for the majority agreed with the reasons given in *Shankari Prasad's* case on the first question and Hidayatullah and Mudholkar, JJ. expressed their dissent from the said view. But all of them agreed, though for different reasons, on the second question. Gajendragadkar, C.J. speaking for himself, Wanchoo and Raghubar Dayal, JJ. rejected the contention that article 368 did not confer power on the Parliament to take away the fundamental rights guaranteed by Part III. When a suggestion was made that the decision in the aforesaid case should be reconsidered and reviewed, the learned Chief Justice, though he conceded that in a case where a decision had a significant impact on the fundamental rights of citizens, the Court would be inclined to review its earlier decision in the interests of the public good, he did not find considerations of substantial and compelling character to do so in that case. But after referring to the reasoning given in *Shankari Prasad's* case the learned Chief Justice observed:

"In our opinion, the expression "amendment of the Constitution" plainly and unambiguously means amendment of all the provisions of the Constitution."

Referring to article 13(2), he restated the same reasoning found in the earlier decision and added that if it was the intention of the Constitution-makers to save fundamental rights from the amending process they should have taken the precaution of making a clear provision in that regard. In short, the majority, speaking through Gajendragadkar, C.J., agreed that no case had been made out for reviewing the earlier decision and practically accepted the reasons given in the earlier decision. Hidayatullah, J., speaking for himself, observed:

"But I make it clear that I must not be understood to have subscribed to the view that the word "law" in article 13(2) does not control constitutional amendments. I reserve my opinion on that case for I apprehend that it depends on how wide is the word "law" in that article."

After giving his reasons for doubting the correctness of the reasoning given in *Shankari Prasad's* case, 1952 SCR 89 (AIR 1951 SC 458) (supra), the learned Judge concluded thus:

"I would require stronger reasons than those given in *Shankari Prasad's* (supra) case to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without the concurrence of the States."

The learned Judge continued:

"The Constitution gives so many assurances in Part III that it would be difficult to think that they were the playthings of a special majority."

Mudholkar, J., was positive that the result of a legislative action of a legislature could not be other than "law" and, therefore, it seemed to him that the fact that the legislation dealt with the amendment of a provision of the Constitution would not make its result any the less a "law". He further pointed out that article 368 did not say that whenever Parliament made an amendment to the Constitution it assumed a different capacity from that of a constituent body. He also brought out other defects in the line of reasoning adopted in *Shankari Prasad's case*, 1952 SCR 89 (AIR 1951 SC 458). It will, therefore, be seen that the correctness of the decision in *Shankari Prasad's case*, 1952 SCR 89 (AIR 1951 SC 458) was not questioned in *Sajjan Singh's case*, 1965-1 SCR 933 (AIR 1965 SC 845). Though it was not questioned, three of the learned Judges agreed with the view expressed therein, but two learned Judges were inclined to take a different view. But, as that question was not raised, the minority agreed with the conclusion arrived at by the majority on the question whether the Seventeenth Amendment Act was covered by the proviso to article 368 of the Constitution. The conflict between the majority and the minority in *Sajjan Singh's case*, 1965-1 SCR 933 (AIR 1965 SC 845) falls to be resolved in this case. The said conflict and the great importance of the question raised is the justification for the constitution of the larger Bench. The decision in *Shankari Prasad's case*, 1952 SCR 89 (AIR 1951 SC 458) was assumed to be correct in subsequent decisions of this Court. See *S. Krishnan v. State of Madras*,<sup>3</sup> *The State of West Bengal v. Anwar Ali Sarkar*<sup>4</sup> and *Bheshwar Nath v. The Commissioner of Income Tax, Delhi and Rajasthan*.<sup>5</sup> But nothing turns upon that fact, as the correctness of the decision was not questioned in those cases.

(15) A correct appreciation of the scope and the place of fundamental rights in our Constitution will give us the right perspective for solving the problem presented before us. Its scope cannot be appreciated unless we have a conspectus of the Constitution, its objects and its machinery to achieve those objects. The objective sought to be achieved by the Constitution is declared in sonorous terms in its Preamble which reads:

"We the people of India have solemnly resolved to constitute India into a Sovereign Democratic Republic and to secure to all its citizens justice, liberty, equality and fraternity."

3. 1951-1 SCR 621 at 652—AIR 1951 SC 301 at p. 312.

4. 1952 SCR 284 at p. 366—AIR 1952 SC 75 at p. 104.

5. SCR 528 at p. 563—AIR 1959 SC 149 at p. 162.

the said two expressions. The standard is an elastic one; it varies with time, space and conditions. What is reasonable under certain circumstances may not be so under different circumstances. The constitutional philosophy of law is reflected in Parts III and IV of the Constitution. The rule of law under the Constitution serves the needs of the people without unduly infringing their rights. It recognizes the social reality and tries to adjust itself to it from time to time avoiding the authoritarian path. Every institution or political party that functions under the Constitution must accept it; otherwise it has no place under the Constitution.

(16) Now, what are the fundamental rights? They are embodied in Part III of the Constitution and they may be classified thus: (i) right to equality, (ii) right to freedom, (iii) right to against exploitation, (iv) right to freedom of religion, (v) cultural and educational rights, (vi) right to property, and (vii) right to constitutional remedies. They are the rights of the people preserved by our Constitution. "Fundamental rights" are the modern name for what have been traditionally known as "natural rights". As one Author puts: "they are moral rights which every human being everywhere at all times ought to have simply because of the fact that in contradistinction with other beings, he is rational and moral". They are the primordial rights necessary for the development of human personality. They are the rights which enable a man to chalk out his own life in the manner he likes best. Our Constitution, in addition to the well-known fundamental rights, also included the rights of the minorities, untouchables and other backward communities, in such rights.

(17) After having declared the fundamental rights, our Constitution says that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the said rights, are, to the extent of such inconsistency, void. The Constitution also enjoins the State not to make any law which takes away or abridges the said rights and declares such laws, to the extent of such inconsistency, to be void. As we have stated earlier, the only limitation on the freedom enshrined in article 19 of the Constitution is that imposed by a valid law operating as a reasonable restriction in the interests of the public.

(18) It will, therefore, be seen that fundamental rights are given a transcendental position under our Constitution and are kept beyond the reach of Parliament. At the same time Parts III and IV constituted an integrated scheme forming a self-contained code. The scheme is made so elastic that all the Directive Principles of State Policy can reasonably be enforced without taking away or abridging the fundamental rights.

While recognizing the immutability of fundamental rights, subject to social control, the Constitution itself provides for the suspension or the modification of fundamental rights under specific circumstances, for instance, article 33 empowers Parliament to modify the rights conferred by Part III in their application to the members of the armed forces, article 34 enables it to impose restrictions on the rights conferred by the said parts while martial law is in force in an area, article 35 confers the power on it to make laws with respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34 may be provided for by law. The non obstante clause with which the last article opens makes it clear that all the other provision of the Constitution are subject to this provision. Article 32 makes the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by the said Parts a guaranteed right. Even during grave emergencies article 358 only suspends the provisions of article 19 and article 359 enables the President by order to declare the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in that order to be suspended; that is to say, even during emergency, only article 19 is suspended temporarily and all other rights are untouched except those specifically suspended by the President.

(19) In the Book "Indian Constitution—Cornerstone of a Nation" by Granville Austin, the scope, origin and the object of fundamental rights have been graphically stated. Therein the learned author says:

".....the core of the commitment to the social revolution lies in parts III and IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution."

Adverting to the necessity for incorporating fundamental rights in a Constitution, the learned author says:

"That a declaration of rights had assumed such importance was not surprising; India was a land of communities, of minorities, racial, religious, linguistic, social and caste. For India to become a state, these minorities had to agree to be governed both at the Centre and in the provinces by fellow Indian-members, perhaps, of another minority—and not by a mediatory third power, the British. On both psychological and political grounds, therefore, the demand for written rights—since rights would provide tangible safeguards, against oppression—proved overwhelming."

Motilal Nehru, who presided over the Committee called for by the Madras Congress resolution, in May, 1928 observed in his report:

"It is obvious that our first care should be to have our Fundamental Rights guaranteed in a manner which will not permit their withdrawal under any circumstances...Another reason why great importance attached to a Declaration of Rights is the unfortunate existence of communal differences in the country. Certain safeguards are necessary to create and establish a sense of security among those who look upon each other with distrust and suspicion. We could not, better secure the full enjoyment of religious and communal rights to all communities than by including them among the basic principles of the Constitution."

(20) Pandit Jawaharlal Nehru, on April 30, 1947 in proposing for the adoption of the Interim Report on Fundamental Rights, said thus:

"A fundamental right should be looked upon, not from the 'point of view of any particular difficulty of the moment, but as something that you want to make permanent in the Constitution. The other matter should be looked upon—however important it might be—not from this permanent and fundamental point of view, but from the temporary point of view."

Pandit Jawaharlal Nehru, who was Prime Minister at that time and who must have had an effective voice in the framing of the Constitution, made this distinction between fundamental rights and other provisions of the Constitution, namely, the former were permanent and the latter were amendable. On September 18, 1949, Dr. Ambedkar in speaking on the amendment proposed by Mr. Kamath to article 304 of the Draft Constitution corresponding to the present article 368, namely, "Any provision of this Constitution may be amended, whether by way of variation, addition or repeal, in the manner provided in this article," said thus:

"Now, what is it we do? We divide the articles of the Constitution under three categories. The first category is the one which consists of articles which can be amended by Parliament by a bare majority. The second set of articles are articles which require two-thirds majority. *If the future Parliament wishes to amend any particular article which is not mentioned in Part III or article 304, all that is necessary for them is to have two-thirds majority. Then they can amend it.*"

Therefore, in Dr. Ambedkar's view the fundamental rights were so important that they could not be amended in the manner provided by article 304 of the Draft Constitution, which corresponds to the present article 368.

(21) We have referred to the speeches of Pandit Jawaharlal Nehru and Dr. Ambedkar not with a view to interpret the provisions of article 368, which we propose to do on its own terms, but only to notice the transcendental character given to the fundamental rights by two of the important architects of the Constitution.

(22) This Court also noticed the paramountcy of the fundamental rights in many decisions. In *A. K. Gopalan v. State of Madras*<sup>6</sup> they are described as "paramount", in *State of Madras v. Smt. Champakam Dorairajan*<sup>7</sup> as "sacrosanct", in *M.S.M. Sharma v. Sri Krishna Sinha*,<sup>8</sup> as "rights reserved by the people", in *Smt. Ujjam Bai v. State of Uttar Pradesh*<sup>9</sup> as "inalienable and inviolable" and in other cases as "transcendental". The minorities regarded them as the bedrock of their political existence and the majority considered them as a guarantee for their way of life. This, however, does not mean that the problem is one of mere dialectics. The Constitution has given by its scheme a place of permanence to the fundamental freedoms. In giving to themselves the Constitution, the people have reserved the fundamental freedoms to themselves. Article 13 merely incorporates that reservation. That article is however not the source of the protection of fundamental rights but the expression of the reservation. The importance attached to the fundamental freedoms is so transcendental that a bill enacted by a unanimous vote of all the members of both the Houses is ineffective to derogate from its guaranteed exercise. It is not what the Parliament regards at a given moment as conducive to the public benefit, but what Part III declares protected, which determines the ambit of the freedom. The incapacity of the Parliament therefore in exercise of its amending power to modify, restrict or impair fundamental freedoms in Part III arises from the scheme of the Constitution and the nature of the freedoms.

(23) Briefly stated, the Constitution declares certain rights as fundamental rights makes all the laws infringing the said rights void, preserves only the laws of social control infringing the said rights and expressly confers power on Parliament and the President to amend or suspend them in specified circumstances; if the decisions in *Shankari Prasad's* case, 1952 SCR 89=(AIR 1951 SC 458) and *Sajjan Singh's* case, 1965-I SCR 933=(AIR 1965 SC 845) laid down the correct law, it enables the same Parliament to abrogate them with one stroke, provided the party in power singly or in combina-

6. 1950 SCR 88 at p. 198=(AIR 1950 SC 27 at p. 72).

7. 1951 SCR 525=(AIR 1951 SC 226).

8. (1959) Supp. (1) SCR 806=(AIR 1959 SC 395).

9. 1963-I SCR 778=(AIR 1962 SC 1621).

tion with other parties commands the necessary majority. While article of less significance would require consent of the majority of the States, fundamental rights can be dropped without such consent. While a single fundamental right cannot be abridged or taken away by the entire Parliament unanimously voting to that effect, a two-thirds' majority can do away with all the fundamental rights. The entire superstructure built with precision and high ideals may crumble at one false step. Such a conclusion would attribute unreasonableness to the makers of the Constitution, for, in that event they would be speaking in two voices. Such an intention cannot be attributed to the makers of the Constitution unless the provisions of the Constitution compel us to do so.

(24) With this background let us proceed to consider the provisions of article 368, *vis-a-vis* article 13(2) of the Constitution.

(25) The first question is whether amendment of the Constitution under article 368 is "law" within the meaning of article 13(2). The marginal note to article 368 describes that article as one prescribing the procedure for amendment. The article in terms only prescribes various procedural steps in the matter of amendment; it shall be initiated by the introduction of a bill in either House of Parliament; it shall be passed by the prescribed majority in both the Houses; it shall then be presented to the President for his assent; and upon such assent the Constitution shall stand amended. The article assumes the power to amend found elsewhere and says that it shall be exercised in the manner laid down therein. The argument that the completion of the procedural steps culminates in the exercise of the power to amend may be subtle but does not carry conviction. If that was the intention of the provisions, nothing prevented the makers of the Constitution from stating that the Constitution may be amended in the manner suggested. Indeed, whenever the Constitution sought to confer a special power to amend on any authority it expressly said so; (*see* articles 4 and 392). The alternative contention that the said power shall be implied either from article 368 or from the nature of the articles sought to be amended cannot be accepted, for the simple reason that the doctrine of necessary implication cannot be invoked if there is an express provision or unless but for such implication the article will become otiose or nugatory. There is no necessity to imply any such power, as Parliament has the plenary power to make any law, including the law to amend the Constitution subject to the limitations laid down therein.

(26) Uninfluenced by any foreign doctrines let us look at the provisions of our Constitution. Under article 245, "subject to provisions of the Constitution, Parliament may make laws for the whole or any part

of the territory of India..." Article 246 demarcates the matters in respect of which Parliament and state Legislatures may make laws. In the field reserved for Parliament there is Entry 97 which empowers it to make laws in respect of "any other matter not enumerated in Lists II and III including any tax not mentioned in either of those lists." Article 248 expressly states that Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List. It is, therefore, clear that the residuary power of legislation is vested in Parliament. Subject to the argument based upon the alleged nature of the amending power as understood by jurists in other countries, which we shall consider at a later stage, it cannot be contended, and indeed, it was not contended, that the Constituent Assembly, if it so minded, could not have conferred an express legislative power on Parliament to amend the Constitution by ordinary legislative process. Articles 4 and 169, and para 7 of the 5th Schedule and para 21 of the 6th Schedule have expressly conferred such power. There is, therefore, no inherent inconsistency between legislative process and the amending one. Whether in the field of a constitutional law or statutory law amendment can be brought about only by law. The residuary power of Parliament, unless there is anything contrary in the Constitution, certainly takes in the power to amend the Constitution. It is said that two articles indicate the contrary intention. As article 245 the argument proceeds, is subject to the provisions of the Constitution, every law of amendment will necessarily be inconsistent with the articles sought to be amended. This is an argument in a circle. Can it be said reasonably that a law amending an article is inconsistent with the article amended? If an article of the Constitution expressly says that it cannot be amended, a law cannot be made amending it, as the power of Parliament to make a law is subject to the said article. It may well be that in a given case such a limitation may also necessarily be implied. The limitation in article 245 is in respect of the power to make a law and not of the content of the law made within the scope of its power. The second criticism is based upon article 392 of the Constitution. That provision confers power on the President to remove difficulties; in the circumstances mentioned in that provision, he can by order direct that the Constitution shall during such period as may be specified in that order have effect subject to such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient. The argument is that the President's power, though confined to a temporary period, is co-extensive with legislative power and if the power to amend is a legislative power it would have to be held that the President can amend the Constitution in terms of article 368. Apart from the limited scope of article 392, which is intended only for the purpose of removing



difficulties and for bringing about a smooth transition, an order made by the President cannot attract article 368, as the amendment contemplated by that provision can be initiated only by the introduction of a bill in the Parliament. There is no force in either of the two criticisms.

(27) Further, there is internal evidence in the Constitution itself which indicates that amendment to the Constitution is a "law" within the meaning of article 245. Now, what is "law" under the Constitution? It is not denied that in its comprehensive sense it includes constitutional law and the law amending the Constitution is constitutional law. But article 13(2) for the purpose of that article gives an inclusive definition. It does not exclude constitutional law. It *prima facie* takes in constitutional law. Article 368 itself gives the necessary clue to the problem. The amendment can be initiated by the introduction of a bill; it shall be passed by the two Houses; *it shall receive the assent of the President*. These are well-known procedural steps in the process of law making. Indeed this Court in *Shankri Prasad's case*, 1952 SCR 89=(AIR 1951 SC 458) brought out this idea in clear terms. It said "In the first place, it is provided that the amendment must be initiated by the introduction of a 'bill in either House of Parliament' a familiar feature of Parliament procedure [*cf.* article 107 (1)] which says 'A bill may originate in either House of Parliament.' Then, the bill must be 'passed in each House.'—Just what Parliament does when it is called upon to exercise its normal legislative function [article 107 (2)]; and finally, the bill thus passed must be 'presented to the President' for his 'assent', again a parliamentary process through which every bill must pass before it can reach the statute-book, (article 111). We thus find that each of the component units of Parliament is to play its allotted part in bringing about an amendment to the Constitution. We have already seen that Parliament effects amendments of the first class mentioned about by going through the same three-fold procedure but with a simple majority. The fact that a different majority in the same body is required for effecting the second and third categories of amendments make the amending agency a different body."

(28) In the same decision it is pointed out that article 368 is not a complete code in respect of the procedure. This Court said "There are gaps in the procedure as to how and after what notice a bill is to be introduced, how it is to be passed by each House and how the President's assent is to be obtained. Having provided for the constitution of a Parliament and prescribed a certain procedure for the conduct of its ordinary legislative business to be supplemented by rules made by each House, (article 118), the makers of the Constitution must be taken to have intended Parliament to follow that procedure, so far as they may be

applicable consistently with the express provision of the article 368, when they have entrusted to it the power of amending the Constitution." The House of the People made rules providing procedure for amendments, the same as for other Bills with the addition of certain special provisions viz., Rules 155, 156, 157 and 158. If amendment is intended to be something other than law, the constitutional insistence on the said legislative process is unnecessary. In short, amendment cannot be made otherwise than by following the legislative process. The fact that there are other conditions, such as, a larger majority and in the case of articles mentioned in the proviso a ratification by Legislatures if provided, does not make the amendment any the less a law. The imposition of further conditions is only a safeguard against hasty action or a protection to the States but does not change the legislative character of the amendment.

(29) This conclusion is reinforced by the other articles of the Constitution. Article 3 enables Parliament by law to form new States and alter areas, boundaries or the names of existing States. The proviso to that Article imposed two further conditions, namely, (i) the recommendation of the President, and (ii) in the circumstances mentioned therein, the views expressed by the Legislatures. Notwithstanding the said conditions it cannot be suggested that the expression "law" under the said article is not one made by the Legislative process. Under article 4, such a law can contain provisions for amendment of Schedules I and IV indicating thereby that amendments are only made by Legislative process. What is more, cl. (2) thereof introduces a fiction to the effect that such a law shall not be deemed to be an amendment to the Constitution. This shows that amendment is law and that but for the fiction it would be an amendment within the meaning of article 368. Article 169 which empowers Parliament by law to abolish or create Legislative Councils in States, para 7 of the 5th Schedule and para 21 of the 6th Schedule which enable Parliament by law to amend the said Schedules, also bring out the two ideas that the amendment is law made by legislative process and that but for the fiction introduced it would attract Article 368. That apart amendments under the said provisions can be made by the Union Parliament by simple majority. That an amendment is made only by legislative process with or without condition will be clear if two decisions of the Privy Council are considered in juxtaposition. They are *McCauley v. The King*<sup>10</sup> and *Bribery Commissioner v. Pedrick Ranasinghe*<sup>11</sup>.

(30) The facts in *McCauley v. The King* 1920 AC 691=(AIR 1920 PC 91) were these: In 1859 Queensland had been granted a Constitution in the terms of an Order in Council made on June 6 of that

<sup>10</sup> 1920 AC 691=(AIR 1920 PC 91).

<sup>11</sup> 1961-2 WLR 1301.

year under powers derived by Her Majesty from the Imperial Statute, 18 & 19 Vict. c. 54. The Order in Council had set up a legislature for the territory, consisting of the Queen, a Legislative Council and a Legislative Assembly, and the law-making power was vested in Her Majesty acting with the advice and consent of the Council and Assembly. Any laws could be made for the "peace, welfare and good government of the Colony". The said legislature of Queensland in the year 1867 passed the Constitution Act of that year. Under that Act power was given to the said legislature to make laws for "peace, welfare and good Government of the Colony in all cases whatsoever". But, under S. 9 thereof a two-thirds majority of the Council and of the Assembly was required as a condition precedent to the validity of legislation altering the constitution of the Council. The Legislature, therefore, had, except in the case covered by S. 9 of the Act, an unrestricted power to make laws. The Legislature passed a law which conflicted with one of the existing terms of the Constitution Act. Lord Birkenhead, L.C., upheld the law, as the Constitution Act conferred an absolute power upon the legislature to pass any law by majority even though it, in substance, amended the terms of the Constitution Act.

(31) In *The Bribery Commissioner v. Pedrick Ranasinghe* (Supra) 1964-2 WLR 1301 the facts are these: By S. 29 of the Ceylon (Constitution) Order in Council, in 1946, Parliament shall have power to make laws for the "peace, order and good government" of the Island and in the exercise of its power under the said section it may amend or repeal any of the provisions of the Order in its application to the Island. The proviso to that section says that no Bill for the amendment or repeal of any of the provisions of the Order shall be presented for the Royal assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of members of the House. Under S. 55 of the said Order the appointment of Judicial Officers was vested in the Judicial Service Commission. But the Parliament under S. 41 of the Bribery Amendment Act, 1958, provided for the appointment of the personnel of the Bribery Tribunals by the Governor-General on the advice of the Minister of Justice. The said Amendment Act was in conflict with the said S. 55 of the Order and it was passed without complying with the terms of the proviso to S. 29 of the Order. The Privy Council held that the Amendment Act was void. Lord Pearce, after considering *McCawley's* case, 1920 AC 691=(AIR 1920 PC 91) (supra) made the following observations, at p. 1310:

".....a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates

its power to make law. This restriction exists independently of the question whether the legislature is sovereign, as is the legislature of Ceylon, or whether the Constitution is "uncontrolled", as the Board held the Constitution of Queensland to be. Such a Constitution can, indeed, be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with..."

(32) It will be seen from the said judgements that an amendment of the Constitution is made only by legislative process with ordinary majority or with special majority, as the case may be. Therefore, amendment either under article 368 or under other articles are made only by Parliament by following the legislative process adopted by it in making other law. In the premises, an amendment of the Constitution can be nothing but "law".

(33) A comparative study of other Constitutions indicates that no particular pattern is followed. All the Constitutions confer an express power to amend, most of them provide for legislative procedure with special majority, referendum, convention etc., and a few with simple majority. Indeed, Parliament of England, which is a supreme body, can amend the constitution like any other statute. As none of the Constitutions contains provisions similar to article 368 and article 13(2), neither the said Constitutions nor the decisions given by courts thereon would be of any assistance in construing the scope of article 368 of our Constitution.

(34) A brief survey of the nature of the amending process adopted by various Constitutions will bring out the futility of any attempt to draw inspiration from the said opinions or decisions on the said Constitutions. The nature of the amending power in different Constitutions generally depends on the nature of the polity created by the Constitution, namely, whether it is federal or unitary Constitution or on the fact whether it is a written or an unwritten Constitution or on the circumstances whether it is a rigid or a flexible Constitution. Particularly the difference can be traced to the "spirit and genius of the nation in which a particular constitution has its birth." The following articles of the Constitution of the different countries are brought to our notice by one or other of the counsel that appeared before us. Article 5 of the Constitution of the United States of America, articles 125 and 128 of the Commonwealth of Australia Constitution Act, article 92(1) of the British North America Act, S. 152 of the South African Act, article 217 of the Constitution of the United States of Brazil, Section 46 of the Constitution of Ireland, 1937, articles 207, 208 and 209 of the Constitution of the Union of Burma, article 88 of the Constitution of the Kingdom of Denmark Act, article 90 of the Constitution of the French Republic, 1954, article 135 of the United States of Mexico, article 96 of the

Constitution of Japan, article 112 of the Constitution of Norway, article 85 of the Constitution of the Kingdom of Sweden, articles 118, 119, 120, 121, 122 and 123 of the Constitution of the Swiss Federation. Articles 140, 141 and 142 of the Constitution of Venezuela, and article 146 of the Constitution of the Union of Soviet Socialist Republics, 1936 and S. 29 (4) of Ceylon Constitution Order in Council, 1946.

(35) Broadly speaking amendments can be made by four methods: (i) by ordinary legislative process with or without restrictions, (ii) by the people through referendum, (iii) by majority of all the units of a federal state; and (iv) by a special convention. The first method can be in four different ways, namely, (i) by the ordinary course of legislation by absolute majority or by special majority, [see Section 92(1) of the British North America Act, sub-section 152 South African Act], whereunder except sections 35, 137 and 152, other provisions could be amended by ordinary legislative process by absolute majority. Many constitutions provide for special majorities; (ii) by a fixed quorum of members for the consideration of the proposed amendment and a special majority for its passage; (see the defunct Constitution of Rumania); (iii) by dissolution and general election on a particular issue; (see the Constitution of Belgium, Holland, Denmark and Norway), and (iv) by a majority of two Houses of Parliament in joint session as in the Constitution of the South Africa. The second method demands a popular vote, referendum or plebiscite as in Switzerland, Australia, Ireland, Italy, France and Denmark. The third method is by an agreement in some form or other of either of the majority or of all the federating units as in Switzerland, Australia and the United States of America. The fourth method is generally by creation of a special body *ad hoc* for the purpose of constitution revision as in Latin America. Lastly, some constitutions impose express limitation on the power to amend (see article 5 of the United States Constitution and the Constitution of the Fourth French Republic). A more elaborate discussion of this topic may be found in the "American Political Constitution" by Strong. It will, therefore, be seen that the power to amend and the procedure to amend radically differ from State to State; it is left to the constitution-makers to prescribe the scope of the power and the method of amendment having regard to the requirements of the particular State. There is no article in any of the constitutions referred to us similar to article 13(2) of our Constitution. India adopted a different system altogether; it empowered the Parliament to amend the Constitution by the Legislative process subject to fundamental rights. The Indian Constitution has made the amending process comparatively flexible, but it is made subject to fundamental rights.

(36) Now let us consider the argument that the power to amend is a sovereign power, that the said power is supreme to the legislative power,

its power to make law. This restriction exists independently of the question whether the legislature is sovereign, as is the legislature of Ceylon, or whether the Constitution is 'uncontrolled', as the Board held the Constitution of Queensland to be. Such a Constitution can, indeed, be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with..."

(32) It will be seen from the said judgements that an amendment of the Constitution is made only by legislative process with ordinary majority or with special majority, as the case may be. Therefore, amendment either under article 368 or under other articles are made only by Parliament by following the legislative process adopted by it in making other law. In the premises, an amendment of the Constitution can be nothing but "law".

(33) A comparative study of other Constitutions indicates that no particular pattern is followed. All the Constitutions confer an express power to amend, most of them provide for legislative procedure with special majority, referendum, convention etc., and a few with simple majority. Indeed, Parliament of England, which is a supreme body, can amend the constitution like any other statute. As none of the Constitutions contains provisions similar to article 368 and article 13(2), neither the said Constitutions nor the decisions given by courts thereon would be of any assistance in construing the scope of article 368 of our Constitution.

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(36) Now let us consider the argument that the power to amend is a sovereign power, that the said power is supreme to the legislative power,

that it does not permit any implied limitations and that amendments made in exercise of that power involve political questions and that, therefore, they are outside judicial review. This wide proposition is sought to be supported on the basis of opinions of jurists and judicial decisions. Long extracts have been read to us from the book "The Amending of the Federal Constitution (1942)" by Lester Bernhardt Orfield, and particular reference was made to the following passage:

"At the point it may be well to note that when the Congress is engaged in the amending process it is not legislating. It is exercising a peculiar power bestowed upon it by Article Five. This Article for the most part controls the process; and other provisions of the Constitution, such as those relating to the passage of legislation, having but little bearing."

Adverting to the Bill of Rights, the learned author remarks that they may be repealed just as any other amendment and that they are no more sacred from a legal standpoint than any other part of the Constitution. Dealing with the doctrine of implied limitations, he says that it is clearly untenable. Posing the question: "Is there a law about the amending power of the Constitution?", he answers, "there is none". He would even go to the extent of saying that the sovereignty, if it can be said to exist at all, is located in the amending body. The author is certainly a strong advocate of the supremacy of the amending power and an opponent of the doctrine of implied limitations. His opinion is based upon the terms of article 5 of the Constitution of the United States of America and his interpretation of the decisions of the Supreme Court of America. Even such an extreme exponent of the doctrine does not say that a particular constitution *cannot expressly impose restrictions on the power to amend* or that a court cannot reconcile the articles couched in unlimited phraseology. Indeed article 5 of the American Constitution imposes express limitations on the amending power. Some passages from the book "Political Science and Government" by James Wilford Garner are cited. Garner points out:

"An unamendable constitution, said Mulford, is the worst tyranny of time, or rather the very tyranny of time."

But he also notices:

"The provision for amendment should be neither so rigid as to make needed changes practically impossible nor so flexible as to encourage frequent and unnecessary changes and thereby lower the authority of the Constitution."

Munro in his book "The Government of the United States", 5th Edition, uses strong words when he says:



".....it is impossible to conceive of an unamendable constitution as anything but a contradiction in terms."

The learned author says that such a constitution would constitute "government by the graveyards." Hugh Evander Willis in his book "Constitutional Law of the United States" avers that the doctrine of amendability of the Constitution is grounded in the doctrine of the sovereignty of the people and that it has no such implied limitations as that an amendment shall not contain a new grant of power or change the dual form of government or change the protection of the Bill of Rights, or make any other change in the Constitution. Herman Finer in his book "The Theory and Practice of Modern Government" defines "constitution" as its process of amendment, for, in his view, to amend is to deconstitute and reconstitute. The learned author concludes that the amending clause is so fundamental to a constitution that he is tempted to call it the constitution itself. But the learned author recognizes that difficulty in amendment certainly produces circumstances and makes impossible the surreptitious abrogation of rights guaranteed in the constitution. William S. Livingston in "Federalism and Constitutional Change" says:

"The former procedure of amendment is of greater importance than the informal processes, because it constitutes a higher authority to which appeal lies on any question that may arise."

But there are equally eminent authors who express a different view. In "American Jurisprudence", 2nd Edition, Vol. 16, it is stated that a statute and a constitution though of unequal dignity are both laws. Another calls the constitution of a State as one of the laws of the State. Cooley in his book on "Constitutional Law" opines that changes in the fundamental laws of the State must be indicated by the people themselves. He further implies limitations to the amending power from the belief in the constitution itself, such as, the republican form of government cannot be abolished as it would be revolutionary in its character. In the same book it is further said that the power to amend the constitution by legislative action does not confer the power to break it any more than it confers the power to legislate on any other subject contrary to the prohibitions. C.F. Strong in his book "Modern Political Constitution", 1963 edition, does not accept the theory of absolute sovereignty of the amending power which does not brook any limitations, for he says:

"In short, it attempts to arrange for the re-creation of a constituent assembly whenever such matters are in future to be considered, even though that assembly be nothing more than the ordinary legislature acting under certain restrictions. At the same time, there may

be some elements of the constitution which the constituent assembly wants to remain unalterable by the action of any authority whatsoever. These elements are to be distinguished from the rest, and generally come under the heading of fundamental law. Thus, for example, the American Constitution, the oldest of the existing Constitutions, asserts that by no process of amendment shall any State, without its own consent, be deprived of its equal suffrage in the Senate, while among the Constitutions more recently promulgated, those of the Republics of France and Italy, each containing a clause stating that the republican form of government cannot be the subject of an amending proposal."

It is not necessary to multiply citations from text books.

(37) A catena of American decisions have been cited before us in support of the contention that the amending power is a supreme power or that it involves political issues which are not justiciable. It would be futile to consider them at length for after going through them carefully we find that there are no considered judgments of the American Courts, which would have a persuasive effect in that regard. In the Constitution of the United States of America, prepared by Edwards S. Corwin, Legislative Reference Service, Library of Congress, (1953 edn), the following summary under the heading 'Judicial Review Under Article V' is given:

"Prior to 1939, the Supreme Court had taken cognizance of a number of diverse objections to the validity of specific amendments. Apart from holding that official notice of ratification by the several States was conclusive upon the Courts, it had treated these questions as justiciable, although it had uniformly rejected them on the merits. In that year, however, the whole subject was thrown into confusion by the inconclusive decision in *Coleman v. Miller*, (1939) 307 US 433. This case came upon a writ of certiorari to the Supreme Court of Kansas to review the denial of a writ of mandamus to compel the Secretary of the Kansan Senate to erase an endorsement on a resolution ratifying the proposed child labour amendment to the Constitution to the effect that it had been adopted by the Kansas Senate. The attempted ratification was assailed on three grounds: (1) that the amendment had been previously rejected by the State Legislature; (2) that it was no longer open to ratification because an unreasonable period of time, thirteen years, had elapsed since its submission to the States, and (3) that the Lieutenant Governor had no right to cast the deciding vote in the Senate in favour of ratification. Four opinions were written in

the Supreme Court, no one of which commanded the support of more than four members of the Court. The majority ruled that the plaintiffs, members of the Kansas State Senate, had a sufficient interest in the controversy to give the federal courts jurisdiction to review the case. Without agreement as to the grounds for their decision, a different majority affirmed the judgment of the Kansas Court denying the relief sought. Four members who concurred in the result had voted to dismiss the writ on the ground that the amending process "is political" in its entirety from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." Whether the contention that the Lieutenant Governor should have been permitted to cast the deciding vote in favour of ratification presented a justiciable controversy was left undecided, the court being equally divided on the point. In an opinion reported as "the opinion of the court" but in which it appears that only three justices concurred, Chief Justice Hughes declared that the writ of mandamus was properly denied because the question as to the effect of the previous rejection of the amendment and the lapse of time since it was submitted to the States were political questions which should be left to Congress. On the same day, the Court dismissed a writ of certiorari to review a decision of the Kentucky Court of Appeals declaring the action of the Kentucky General Assembly purporting to ratify the child labour amendment illegal and void. Inasmuch as the governor had forwarded the certified copy of the resolution to the Secretary of States before being served with a copy of the restraining order issued by the State Court, the Supreme Court found that there was no longer a controversy susceptible of judicial determination.

This passage, in our view, correctly summarises the American law on the subject. It will be clear therefrom that prior to 1939 the Supreme Court of America had treated the objections to the validity of specific amendments as justiciable and that only in 1939 it rejected them in an inconclusive judgment without discussion. In this state of affairs we cannot usefully draw much from the judicial wisdom of the Judges of the Supreme Court of America.

(38) One need not cavil at the description of an amending power as sovereign power, for it is sovereign only within the scope of the power conferred by a particular constitution. All the authors also agree, that a particular constitution can expressly limit the power of amendment, both substantive and procedural. The only conflict lies in the fact that some authors do not permit implied limitations when the power of amendment

is expressed in general words. But others countenance such limitations by construction or otherwise. But none of the authors goes to the extent of saying, which is the problem before us, that when there are conflicting articles couched in widest terms, the court has no jurisdiction to construe and harmonize them. If some of the authors meant to say that—in our view, they did not—we cannot agree with them, for, in that event this Court would not be discharging its duty.

(39) Nor can we appreciate the arguments repeated before us by learned counsel for the respondents that the amending process involves political questions which are, outside the scope of judicial review. When a matter comes before the Court, its jurisdiction does not depend upon the nature of the question raised but on the question whether the said matter is expressly or by necessary implication excluded from its jurisdiction. Secondly, it is not possible to define what is a political question and what is not. The character of a question depends upon the circumstances and the nature of a political society. To put it differently, the Court does not decide any political question at all in the ordinary sense of the term, but only ascertains whether, Parliament is acting within the scope of the amending power. It may be that Parliament seeks to amend the Constitution for political reasons, but the Court in denying that power will not be deciding on political questions, but will only be holding that Parliament has no power to amend particular articles of the Constitution for any purpose whatsoever, be it political or otherwise. We, therefore, hold that there is nothing in the nature of the amending power which enables the Parliament to override all the express or implied limitations imposed on that power. As we have pointed out earlier, our Constitution adopted a novel method in the sense that Parliament makes the amendment by legislative process subject to certain restrictions and that the amendment so made being 'law' is subject to article 13(2).

(40) The next argument is based upon the expression "amendment" in article 368 of the Constitution and it is contended that the said expression has a positive and a negative content and that in exercise of the power of amendment Parliament cannot destroy the structure of the Constitution, but it can only modify the provisions thereof within the framework of the original instrument for its better effectuation. If the fundamentals would be amenable to the ordinary process of amendment with a special majority, the argument proceeds, the institutions of the President can be abolished, the parliamentary executive can be removed, the fundamental rights can be abrogated, the concept of federalism can be obliterated and in short the sovereign democratic republic can be converted into a totalitarian system of government. There is considerable force in this argument. Learned and lengthy arguments are advanced to

sustain it or to reject it. But we are relieved of the necessity to express our opinion on this all important question, as, so far as the fundamental rights are concerned, the question raised can be answered on a narrower basis. This question may arise for consideration only if Parliament seeks to destroy the structure of the Constitution embodied in the provisions other than in Part III of the Constitution. We do not, therefore, propose to express our opinion in that regard.

(41) In the view we have taken on the scope of article 363 *vis-à-vis* the fundamental rights, it is also unnecessary to express our opinion on the question whether the amendment of the fundamental rights is covered by the proviso to article 368.

(42) The result is that the Constitution (Seventeenth Amendment) Act, 1964 inasmuch, as it takes away or abridges the fundamental rights is void under article 13(2) of the Constitution.

(43) The next question is whether our decision should be given retrospective operation. During the period between 1950 and 1967 *i.e.* 17 years, as many as 20 amendments were made in our Constitution. But in the context of the present petitions it would be enough if we notice the amendments affecting fundamental right to property. The Constitution came into force on January 26, 1950. The Constitution (First Amendment) Act, 1951, amended articles 15 and 19, and articles 31-A and 31-B were inserted with retrospective effect. The object of the amendment was said to be to validate the acquisition of zamindaries or the abolition of permanent settlement without interference from Courts. The occasion for the amendment was that the High Court of Patna in *Kamthkar Singh v. State of Bihar*<sup>12</sup> held that the Bihar Land Reforms Act (30 of 1950) passed by the State of Bihar was unconstitutional, while the High Courts of Allahabad and Nagpur upheld the validity of corresponding legislations in Uttar Pradesh and Madhya Pradesh respectively. The amendment was made when the appeals from those decisions were pending in the Supreme Court. In *Shankari Prasad's case*, 1952 SCR 89<sup>13</sup> (AIR 1951 SC 453) (*supra*) the constitutionality of the said amendment was questioned but the amendment was upheld. It may be noticed that the said amendment was not made on the basis of the power to amend fundamental rights recognized by this Court, but only in view of the conflicting decisions of High Courts and without waiting for the final decision from this Court. Article 31-A was again amended by the Constitution (Fourth Amendment) Act, 1955. Under that amendment cl. (2) of article 31 was amended and cl. (2-A) was inserted therein. While in the original article 31-A the general expression 'any provisions of this Part' was found, in the

amended article the scope was restricted only to the violation of articles 14, 19 and 31 and 4 other clauses were included, namely, clauses providing for (a) taking over the management of any property by the State for a limited period; (b) amalgamation of two or more corporations; (c) extinguishment or modification of rights or persons interested in corporations; and (d) extinguishment or modification of rights accruing under any agreement, lease or licence relating to minerals, and the definition of 'estate' was enlarged in order to include the interests of raiyats and under-raiyats. The expressed object of the amendment was to carry out important social welfare legislations on the desired lines, to improve the national economy of the State and to avoid serious difficulties raised by courts in that regard. Article 31-A has further been amended by the Constitution (Fourth Amendment) Act, 1955. By the said amendment in the Ninth Schedule to the Constitution entries 14 to 20 were added. The main object of this amending Act was to distinguish the power of compulsory acquisition or requisitioning of private property and the deprivation of property and to extend the scope of article 31-A to cover different categories of social welfare legislations and to enable monopolies in particular trade or business to be created in favour of the State. Amended article 31(2) makes the adequacy of compensation not justiciable. It may be said that the Constitution (Fourth Amendment) Act, 1955 was made by Parliament as this Court recognized the power of Parliament to amend Part III of the Constitution; but it can also be said with some plausibility that, as Parliament had exercised the power even before the decision of this court in *Shankari Prasad's case*, 1952 SCR 89=(AIR 1951 SC 458) (supra), it would have amended the Constitution even if the said decision was not given by this Court. The Seventeenth Amendment Act was made on June 20, 1964. The occasion for this amendment was the decision of this Court in *Karimil Kunhikoman v. State of Kerala*<sup>13</sup> which struck down the Kerala Agrarian Relations Act IV of 1961 relating to ryotwari lands. Under that amendment the definition of the expression 'estate' was enlarged so as to take in any land held under ryotwari settlement and any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans. In the Ninth Schedule the amendment included items 21 to 65. In the objects and reasons it was stated that the definition 'estate' was not wide enough, that the courts had struck down many land reforms Acts and that, therefore, in order to give them protection the amendment was made. The validity of the Seventeenth Amendment Act was questioned in this Court and was held

13. (1962) Supp. (1) SCR 829=AIR 1962 SC 723.

to be valid in *Sajjan Singh's* case, 1965-1 SCR 933=(AIR 1965 SC 845) (supra). From the history of these amendments, two things appear, namely, unconstitutional laws were made and they were protected by the amendment of the Constitution or the amendments were made in order to protect the future laws which would be void but for the amendments. But the fact remains that this Court held as early as in 1951 that Parliament had power to amend the fundamental rights. It may, therefore, be said that the Constitution (Fourth Amendment) Act, 1955, and the Constitution (Seventeenth Amendment) Act, 1964, were based upon the scope of the power to amend recognized by this Court. Further the Seventeenth Amendment Act was also approved by this Court.

(44) Between 1950 and 1967 the Legislatures of various States made laws bringing about an agrarian revolution in our country—zamindaries, inams and other intermediary estates were abolished, vested rights were created in tenants, consolidation of holdings of villages was made, ceilings were fixed and the surplus lands transferred to tenants. All these were done on the basis of the correctness of the decisions in *Shankari Prasad's* case, 1952 SCR 89=(AIR 1951 SC 458) (supra) and *Sajjan Singh's* case, 1965-1 SCR 933=(AIR 1965 SC 845) (supra), namely, that Parliament had the power to amend the fundamental rights and that Acts in regard to estates were outside judicial scrutiny on the ground they infringed the said rights. The agrarian structure of our country has been revolutionised on the basis of the said laws. Should we now give retrospectivity to our decision, it would introduce chaos and unsettle the conditions in our country. Should we hold that because of the said consequences Parliament had power to take away fundamental rights, a time might come when we would gradually and imperceptibly pass under a totalitarian rule. Learned counsel for the petitioners as well as those for the respondents placed us on the horns of this dilemma, for they have taken extreme positions—learned counsel for the petitioners want us to reach the logical position by holding that all the said laws are void and the learned counsel for the respondents persuade us to hold that Parliament has unlimited power and, if it chooses, it can do away with fundamental rights. We do not think that this court is so helpless. As the highest Court in the land we must evolve some reasonable principle to meet this extraordinary situation. There is an essential distinction between Constitution and Statutes. Comparatively speaking, Constitution is permanent; it is an organic statute; it grows by its own inherent force. The Constitutional concepts are couched in elastic terms. Courts are expected to and indeed should interpret, its terms without doing violence

realm of ordinary statutes, the subtle working of the process is apparent though the approach is more conservative and inhibitive. In the constitutional field, therefore, to meet the present extraordinary situation that may be caused by our decision, we must evolve some doctrine which has roots in reason and precedents so that the past may be preserved and the future protected.

(44-A) There are two doctrines familiar to American Jurisprudence, one is described as Blackstonian theory and the other as 'prospective over-ruling', which may have same relevance to the present enquiry. Blackstone in his Commentaries, 69 (15th edn. 1809) stated the common law rule that the duty of the Court was "not to pronounce a new rule but to maintain and expound the old one". It means the Judge does not make law but only discovers or finds the true law. The law has always been the same. If a subsequent decision changes the earlier one, the latter decision does not make law but only discovers the correct principle of law. The result of this view is that it is necessarily retrospective in operation. But Jurists, George F. Canfield, Robert Hill Freeman, John Henry Wigmore and Cardozo, have expounded the doctrine of 'prospective over-ruling' and suggested it as "a useful judicial tool". In the words of Canfield the said expression means:

".....a Court should recognize a duty to announce a new and better rule for future transactions whenever the court has reached the conviction that an old rule (as established by the precedents) is unsound even though feeling compelled by *stare decisis* to apply the old and condemned rule to the instance case and to transactions which had already taken place."

Cardozo, before he became a Judge of the Supreme Court of the United States of America, when he was the Chief Justice of New York State addressing the Bar Association said thus:

"The rule (the Blackstonian rule) that we are asked to apply is out of tune with the life about us. It has been made discordant by the forces that generate a living law.

We apply it to this case because the repeal might work hardship to those who have trusted to its existence. We give notice however, that any one trusting to it hereafter will do at his peril."

The Supreme Court of the United States of America in the year 1932, after Cardozo became an Associate Justice of that Court in *Great Northern Railway v. Sunburst Oil & Ref. Co.*<sup>14</sup>, applied the said doctrine to the facts of that case. In that case the Montana Court had adhered to its

14. (1932) 287 U.S. 358, 366=77 Law Ed. 360.



previous construction of the statute in question but had announced that interpretation would not be followed in the future. It was contended before the Supreme Court of the United States of America that a decision of a court over-ruling earlier decision and not giving its ruling retroactive operation violated the due process clause of the 14th Amendment. Rejecting that plea, Cardozo said:

"This is not a case where a court in over-ruling an earlier decision has come to the new ruling of retroactive dealing and thereby has made invalid what was followed in the doing. Even that may often be done though litigants not infrequently have argued to the contrary...This is a case where a Court has refused to make its ruling retroactive, and the novel stand is taken that the Constitution of the United States is infringed by the refusal. We think that the Federal Constitution has no voice upon the subject. A state in defining the elements of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may be so that the decision of the highest courts, though later over-ruled, was law nonetheless for intermediate transactions...On the other hand, it may hold to the ancient dogma that the law declared by its Courts had a platonic or ideal existence before the act of declaration, in which even, the discredited declaration will be viewed as if it had never been and to reconsider declaration as law from the beginning...The choice for any state may be determined by the juristic philosophy of the Judges of her Courts, their considerations of law, its origin and nature."

The opinion of Cardozo tried to harmonize the doctrine of prospective over-ruling with that of *stare decisis*.

(45) In 1940, Huges, C. J. in *Chicot County Drainage District v. Baxter State Bank*<sup>15</sup>, stated thus:

"The law prior to the determination of unconstitutionality is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration."

In *J. Graffin v. Peoples of the State of Illionis*<sup>16</sup>, the Supreme Court of America reaffirmed the doctrine laid down in *Sunburst's* case, (1932) 287 US 358=77 Law Ed. 360 (supra). There, a statute required defendants to submit bills of exceptions as a pre-requisite to an appeal from a conviction; the Act was held unconstitutional in that it provided no means whereby indigent defendants could secure a copy of the record for this purpose. Frankfurter, J. in that context observed:

15. (1940) 308 US 371.

16. (1956) 351 US 12, 20.

".....in arriving at a new principle, the judicial process is not important to define its scope and limits. Adjudication is not a mechanical exercise nor does it compel 'either or' determination."

In *J. A. Wolf v. Peoples of the State of Colorado*<sup>17</sup> a majority of the Supreme Court held that in a prosecution in a State Court for a state crime, the 14th Amendment did not forbid the admission of evidence obtained by an unreasonable search and seizure. But in *Mapp v. Ohio*<sup>18</sup> the Supreme Court reversed that decision and held that all evidence obtained by searches and seizure in violation of the 4th Amendment of the Federal Constitution was, by virtue of the due process clause of the 14th Amendment guaranteeing the right to privacy free from unreasonable State intrusion, inadmissible in a State Court. In *Linkletter v. Walker*<sup>19</sup>, the question arose whether the exclusion of the rule enunciated in *Mapp v. Ohio*, 1961 (367) US 643=6 Law Ed. 2nd Ed. 1081 (supra) did not apply to State Court's convictions which had become final before the date of that judgment. Mr. Justice Clarke, speaking for the majority observed:

"We believe that the existence of the Wolf doctrine prior to Mapp is 'an operative' fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration."

"Mapp had as its prima purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights.

We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to Mapp has already occurred and will not be corrected by releasing the prisoners involved. On the other hand, the States relied on Wolf and followed its command. Final judgments of conviction were entered prior to Mapp. Again and again the Court refused to reconsider Wolf and gave its implicit approval to hundreds of cases in their application of its rule. In rejecting the Wolf doctrine as to the exclusionary rule the purpose was to deter the lawless action of the police and to effectively enforce the Fourth Amendment. That purpose will not at this late date be served by the wholesale release of the guilty victims."

"Finally, there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of

17. (1949) 338 US 25=93 Law Ed. 1782.

18. (1961) 367 US 643=6 Law Ed. 2nd Ed. 1081.

19. (1965) 381 US 618.

Mapp retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witness available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice."

This case has reaffirmed the doctrine of prospective overruling and has taken a pragmatic approach in refusing to give it retroactivity. In short, in America the doctrine of prospective overruling is now accepted in all branches of law, including constitutional law. But the carving of the limits of retrospectivity of the new rule is left to courts to be done, having regard to the requirements of justice. Even in England the Blackstonian theory was criticized by Bentham and Austin. In Austin's *Jurisprudence*, 4th Ed., at page 65, the learned author says:

"What hindered Blackstone was 'the childish fiction' employed by our Judges, that judiciary or common law is not made by them, but is a miraculous something made, by no body, existing, I suppose, from eternity, and merely declared from time to time by the Judges."

(46) Though English Courts in the past accepted the Blackstonian theory and though the House of Lords strictly adhered to the doctrine of 'precedent' in the earlier years, both the doctrines were practically given up by the "Practice Statement (Judicial Precedent)" issued by the House of Lords recorded in (1966) 1 WLR 1234. Lord Gardiner L. C., speaking for the House of Lords made the following observations:

"Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."

"In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law."

"The announcement is not intended to affect the use of precedent elsewhere than in this House."

It will be seen from this passage that the House of Lords hereafter in appropriate cases may depart from its previous decision when it appears

right to do so and in so departing will bear in mind the danger of giving effect to the said decision retroactivity. We consider that what the House of Lords means by this statement is that in differing from the precedents it will do so only without interfering with the transactions that had taken place on the basis of earlier decisions. This decision, to a large extent, modifies the Blackstonian theory and accepts, though not expressly but by necessary implication the doctrine of "prospective over-ruling".

(47) Let us now consider some of the objections to this doctrine. The objections are: (1) the doctrine involved legislation by courts; (2) it would not encourage parties to prefer appeals as they would not get any benefit therefrom; (3) the declaration for the future would only be obiter; (4) it is not a desirable change; and (5) the doctrine of retroactivity serves as a brake on courts which otherwise might be tempted to be so fascile in over-ruling. But in our view, these objections are not insurmountable. If a court can over-rule its earlier decision—there cannot be any dispute now that the court can do so—there cannot be any valid reason why it should not restrict its ruling to the future and not to the past. Even if the party filing an appeal may not be benefited by it, in similar appeals which he may file after the change in the law he will have the benefit. The decision cannot be obiter for what the court in effect does is to declare the law but on the basis of another doctrine restricts its scope. Stability in law does not mean that injustice shall be perpetuated. An illuminating article on the subject is found in *Pennsylvania Law Review*.

(48) It is modern doctrine suitable for a fast moving society. It does not do away with the doctrine of *stare decisis*, but confines it to past transactions. It is true that in one sense the court only declares the law, either customary or statutory or personal law. While in strict theory it may be said that the doctrine involves making of law, what the court really does is to declare the law but refuses to give retroactivity to it. It is really a pragmatic solution reconciling the two conflicting doctrines, namely, that a court finds law and that it does make law. It finds law but restricts its operation to the future. It enables the Court to bring about a smooth transition by correcting its errors without disturbing the impact of those errors on the past transactions. It is left to the discretion of the court to prescribe the limits of the retrospectivity and thereby it enables it to mould the relief to meet the ends of justice.

(49) In India there is no statutory prohibition against the court refusing to give retroactivity to the law declared by it. Indeed, the doctrine of *res judicata* precludes any scope for retroactivity in respect of a subject matter that has been finally decided between the parties. Further

Indian Courts by interpretation reject retroactivity to statutory provisions though couched in general terms on the ground that they affect vested rights. The present case only attempts a further extension of the said rule against retroactivity.

(50) Our Constitution does not expressly or by necessary implication speak against the doctrine of prospective over-ruling. Indeed, articles 32, 141 and 142 are couched in such wide and elastic terms as to enable this Court to formulate legal doctrines to meet the ends of justice. The only limitation thereon is reason, restraint and injustice. Under article 32, for the enforcement of the fundamental rights the Supreme Court has the power to issue suitable directions or orders or writs. Article 141 says that the law declared by the Supreme Court shall be binding on all courts; and article 142 enables it in the exercise of its jurisdiction to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. These articles are designedly made comprehensive to enable the Supreme Court to declare law and to give such directions or pass such orders, as are necessary to do complete justice. The expression 'declared' is wider than the words 'found or made'. To declare is to announce opinion. Indeed, the latter involves the process, while the former expresses result. Interpretation, ascertainment and evolution are parts of the process, while that interpreted, ascertained or evolved is declared as law. The law declared by the Supreme Court is the law of the land. If so, we do not see any acceptable reason why it, in declaring the law in supersession of the law declared by it earlier, could not restrict the operation of the law as declared to future and save the transactions, whether statutory or otherwise that were effected on the basis of the earlier law. To deny this power to the Supreme Court on the basis of some outmoded theory that the Court only finds law but does not make it is to make ineffective the powerful instrument of justice placed in the hands of the highest judiciary of this country.

(51) As this court for the first time has been called upon to apply the doctrine evolved in a different country under different circumstances, we would like to move warily in the beginning. We would lay down the following propositions: (1) The doctrine of prospective over-ruling can be invoked only in matters arising under our Constitution; (2) it can be applied only by the highest court of the country, *i.e.*, the Supreme Court as it has the constitutional jurisdiction to declare law binding on all the courts in India; (3) the scope of the retroactive operation of the law declared by the Supreme Court superseding its 'earlier decisions' is left to its discretion to be moulded in accordance with the justice of the cause or matter before it.

(52) We have arrived at two conclusions, namely, (1) the Parliament has no power to amend Part III of the Constitution so as to take away or abridge the fundamental rights; and (2) this is a fit case to invoke and apply the doctrine of prospective over-ruling. What then is the effect of our conclusion on the instant case? Having regard to the history of the amendments, their impact on the social and economic affairs of our country and the chaotic situation that may be brought about by the sudden withdrawal at this stage of the amendments from the Constitution, we think that considerable judicial restraint is called for. We, therefore, declare that our decision will not affect the validity of the Constitution (Seventeenth Amendment) Act, 1964, or other amendments made to the Constitution taking away or abridging the fundamental rights. We further declare that in future the Parliament will have no power to amend Part III of the Constitution so as to take away or abridge the fundamental rights. In this case we do not propose to express our opinion on the question of the scope of the amendability of the provisions of the Constitution other than the fundamental rights, as it does not arise for consideration before us. Nor are we called upon to express our opinion on the question regarding the scope of the amendability of Part III of the Constitution otherwise than by taking away or abridging the fundamental rights. We will not also indicate our view one way or other whether any of the Acts questioned can be sustained under the provisions of the Constitution without the aid of articles 31-A, 31-B and the 9th Schedule.

(53) The aforesaid discussion leads to the following results:

(1) The power of the Parliament to amend the Constitution is derived from articles 245, 246 and 248 of the Constitution and not from article 368 thereof which only deals with procedure. Amendment is a legislative process.

(2) Amendment is 'law' within the meaning of article 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void.

(3) The Constitution (First Amendment) Act, 1951, Constitution (Fourth Amendment) Act, 1955, and the Constitution (Seventeenth Amendment) Act, 1964, abridge the scope of the fundamental rights. But, on the basis of earlier decisions of this Court, they were valid.

(4) On the application of the doctrine of 'prospective over-ruling', as explained by us earlier, our decision will have only prospective operation and, therefore, the said amendments will continue to be valid.

(5) We declare that the Parliament will have no power from the date of this decision to amend any of the provisions of Part III of the

Constitution so as to take away or abridge the fundamental rights enshrined therein.

(6) As the Constitution (Seventeenth Amendment) Act holds the field, the validity of the two impugned Acts, namely, the Punjab Security of Land Tenures Act X of 1953, and the Mysore Land Reforms Act X of 1962, as amended by Act XIV of 1965, cannot be questioned on the ground that they offend articles 13, 14 or 31 of the Constitution.

(54) Before we close, it would be necessary to advert to an argument advanced on emotional plane. It was said that if the provisions of the Constitution could not be amended it would lead to revolution. We have not said that the provisions of the Constitution cannot be amended but what we have said is that they cannot be amended so as to take away or abridge the fundamental rights. Nor can we appreciate the argument that all the agrarian reforms which the Parliament in power wants to effectuate cannot be brought about without amending the fundamental rights. It was exactly to prevent this attitude and to protect the rights of the people that the fundamental rights were inserted in the Constitution. If it is the duty of the Parliament to enforce the directive principles, it is equally its duty to enforce them without infringing the fundamental rights. The Constitution-makers thought that it could be done and we also think that the directive principles can reasonably be enforced within the self-regulatory machinery provided by Part III. Indeed both Parts III and IV of the Constitution form an integrated scheme and is elastic enough to respond to the changing needs of the society. The verdict of the Parliament on the scope of the law of social control of fundamental rights is not final, but justiciable. If not so, the whole scheme of the Constitution will break. What we cannot understand is how the enforcement of the provisions of the Constitution can bring about a revolution. History shows that revolutions are brought about not by the majorities but by the minorities and some time by military coups. The existence of an all comprehensive amending power cannot prevent revolutions, if there is chaos in the country brought about by mis-rule or abuse of power. On the other hand, such a restrictive power gives stability to the country and prevents it from passing under a totalitarian or dictatorial regime. We cannot obviously base our decision on such hypothetical or extraordinary situations which may be brought about with or without amendments. Indeed, a Constitution is only permanent and not eternal. There is nothing to choose between destruction by amendment or by revolution, the former is brought about by totalitarian rule, which cannot brook constitutional checks and the other by the discontentment brought about by mis-rule. If either happens, the constitution will be a scrap of paper. Such considerations are out of place in construing the provisions of the Constitution by a court of law.

(55) Nor are we impressed by the argument that if the power of amendment is not all comprehensive there will be no way to change the structure of our Constitution or abridge the fundamental rights even if the whole country demands for such a change. Firstly, this visualizes an extremely unforeseeable and extravagant demand; but even if such a contingency arises, the residuary power of the Parliament may be relied upon to call for a Constituent Assembly for making a new Constitution or radically changing it. The recent Act providing for a poll in Goa, Daman and Diu is an instance of analogous exercise of such residuary power by the Parliament. We do not express our final opinion on this important question.

(56) A final appeal is made to us that we shall not take a different view as the decision in *Shankari Prasad's case*, 1952 SCR 89=(AIR 1951 SC 458) held the field for many years. While ordinarily this Court will be reluctant to reverse its previous decision, it is its duty in the constitutional field to correct itself as early as possible, for otherwise the future progress of the country and the happiness of the people will be at stake. As we are convinced that the decision in *Shankari Prasad's case*, 1952 SCR 89=(AIR 1951 SC 458) is wrong, it is pre-eminently a typical case where this Court should over-rule it. The longer it holds the field the greater will be the scope for erosion of fundamental rights. As it contains the seeds of destruction of the cherished rights of the people the sooner it is over-ruled the better for the country.

(57) This argument is answered by the remarks made by this Court in the recent judgment in *The Superintendent and Legal Remembrancer State of West Bengal v. The Corporation of Calcutta*,<sup>20</sup> (Criminal Appeal No. 193 of 1964, D/- 7-12-1966.)

"The third contention need not detain us for it has been rejected by this Court in *The Bengal Immunity Company Limited v. The State of Bihar*.<sup>21</sup> There a Bench of 7 judges unanimously, held that there was nothing in the Constitution that prevented the Supreme Court from departing from a previous decision of its own if it was satisfied of its error and of its baneful effect on the general interest of the public. If the aforesaid rule of construction accepted by this Court is inconsistent with the legal philosophy of our Constitution, it is our duty to correct ourselves and lay down the right rule. In constitutional matters which effect the evolution of our polity, we must more readily do so than in other branches of law, as perpetuation of a mistake will be harmful to public interests. While

<sup>20</sup>. AIR 1967 SC 997.

<sup>21</sup>. 1953-2 SCR 603=AIR 1953 SC 651.



continuity and consistency are "conducive to the smooth evolution of the rule of law, hesitancy to set right deviation will retard its growth. In this case, as we are satisfied that the said rule of construction is inconsistent with our republican policy and, if accepted, bristles with anomalies, we have no hesitation to reconsider our earlier decision."

(58) In the result the petitions are dismissed, but in the circumstances without costs.

Wanchoo (K. N.) J. (on behalf, of himself, V. Bhargava and G.K. Mitter JJ):

(59) This Special Bench of eleven Judges of this Court has been constituted to consider the correctness of the decision of this Court in *Sri Shankari Prasad Singh Des v. Union of India* 1952 SCR 89=(AIR 1951 SC 458) which was accepted as correct by the majority in *Sajjan Singh v. State of Rajasthan*, 1965-1 SCR 933=(AIR 1965 SC 845)

(60) The reference has been made in three petitions challenging the constitutionality of the Seventeenth Amendment to the Constitution. In one of the petitions, the inclusion of the Punjab Security of Land Tenures Act, (No. X of 1953) in the Ninth Schedule, which makes it immune from attack under any provisions contained in Part III of the Constitution, has been attacked on the ground that the Seventeenth Amendment is in itself unconstitutional. In the other two petitions, the inclusion of the Mysore Land Reforms Act, (No. 10 of 1962) has been attacked on the same grounds. It is not necessary to set out the facts in the three petitions for present purposes. The main argument in all the three petitions has been as to the scope and effect of article 368 of the constitution and the power conferred thereby to amend the constitution.

(61) Before we come to the specific points raised in the present petitions, we may indicate the circumstances in which *Shankari Prasad's* case, 1952 SCR 89=(AIR 1951 SC 458) as well as *Sajjan Singh's* case, 1965-1 SCR 933=(AIR 1965 SC 845) came to be decided and what they actually decided. The Constitution came into force on January 26, 1950. It provides in Part III for certain fundamental rights. Article 31 which is in Part III, as it originally stood, provided for compulsory acquisition of property. By clause (1) it provided that "no person shall be deprived of his property save by authority of law". Clause (2) thereof provided that any law authorising taking of possession or acquisition of property must provide for compensation therefor and either fix the amount of compensation or specify the principles on which, and the manner in which, the compensation was to be determined and paid. Clause (4) made a special provision to the effect that if any Bill pending at the commencement of the Constitution in the Legislature of a State had,

after it had been passed by such Legislature, been reserved for the consideration of the President and had received his assent, then such law would not be called in question though it contravened the provisions of cl. (2) relating to compensation. Clause (6) provided that any law of the State enacted not more than eighteen months before the Constitution might be submitted to the President for his certification, and if so certified, it could not be called in question on the ground that it contravened the provision of cl. (2) of article 31 relating to compensation.

(62) These two clauses of article 31 were meant to safeguard Legislation which either had been passed by provincial or State Legislatures or which was on the anvil of State legislatures or for the purposes of agrarian reforms. One such piece of legislation was the Bihar Land Reforms Act, which was passed in 1930. That Act received the assent of the President as required under cl. (6) of article 31. It was, however, challenged before the Patna High Court and was struck down by that court on the ground that it violated article 14 of the Constitution. Then there was an appeal before this Court, but while that appeal was pending, the First Amendment to the Constitution was made.

(63) We may briefly refer to what the First Amendment provided for. It was the First Amendment which was challenged and was upheld in *Shankari Prasad's case*, 1952 SCR 89=(AIR 1951 SC 458). The first Amendment contained a number of provisions; but it is necessary for present purposes only to refer to those provisions which made changes in Part III of the Constitution. These changes related to articles 15 and 19 and in addition, provided for insertion of two articles numbered 31-A and 31-B in Part III. Article 31-A provided that no law providing for the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights shall be deemed to be void on the ground that it was inconsistent with, or took away or abridged any of the rights conferred by any provision in Part III. The word "estate" was also defined for the purpose of article 31-A. Further article 31-B provided for validation of certain Acts and Regulations and specified such Acts and Regulations in the Ninth Schedule, which was for the first time added to the Constitution. The Ninth Schedule then contained 13 Acts, all relating to estates, passed by various legislatures of the Provinces or States. It laid down that those Acts and Regulations would not be deemed to be void or ever to have become void, on the ground that they were inconsistent with or took away or abridged any of the rights conferred by any provision of Part III. It further provided that notwithstanding any judgment, decree or order of any court or tribunal to the contrary, all such Acts and Regulations subject to the power of any competent legislature to repeal or amend them, continue in force.

(64) This amendment, and in particular articles 31-A and 31-B were immediately challenged by various writ petitions in this Court and these came to be decided on October 5, 1951 in *Shankari Prasad's case*, 1952 SCR 89=(AIR 1951 SC 458). The attack on the validity of the First Amendment was made on various grounds; but three main grounds which were taken were firstly that amendments to the Constitution made under article 368 were liable to be tested under article 13(2); secondly, that in any case as articles 31-A and 31-B inserted in the Constitution by the First Amendment affected the power of the High Court under article 226 and of this Court under articles 132 and 136 the amendment required ratification under the proviso to article 368; and thirdly, that articles 31-A and 31-B were invalid on the ground that they related to matters covered by the State List, namely, item 18 of List II, and could not therefore be passed by Parliament. This Court rejected all the three contentions. It held that although "law" would ordinarily include constitutional law, there was a clear demarcation between ordinary law made in the exercise of legislative power and constitutional law made in the exercise of constituent power, and in the context of article 13 "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power, in consequence article 13(2) did not affect amendments made under article 368. It further held that articles 31-A and 31-B did not curtail the power of the High Court under article 226 or of this Court under articles 132 and 136 and did not require ratification under the proviso contained in article 368. Finally, it was held that articles 31-A and 31-B were essentially amendments to the Constitution and Parliament as such had the power to enact such amendments. In consequence, the First Amendment to the Constitution was upheld as valid.

(65) After this decision, there followed sixteen more amendments to the Constitution till we come to the Seventeenth Amendment, which was passed on June 20, 1964. There does not seem to have been challenge to any amendment upto the Sixteenth Amendment, even though two of them, namely the Fourth Amendment and the Sixteenth Amendment, contained changes in the provisions of Part III of the Constitution. Further, the nature of these amendments was to add to or alter or delete various other provisions of the Constitution contained in Part III thereof. On December 5, 1961, came the decision of this court by which the Kerala Agrarian Reforms Act (No. 4. of 1961), passed by the Kerala Legislature, was struck down, among other grounds, for the reason that ryotwari lands in South India were not estates within the meaning of article 31-A and therefore acquisition of ryotwari land was not protected under

article 31-A of the Constitution; (see *Karimbil Kunhikoman v. State of Kerala*)<sup>22</sup>. This decision was followed by the Seventeenth Amendment on June 20, 1964. By this amendment, changes were made in article 31-A of the Constitution and 44 acts were included in the Ninth Schedule to give them complete protection from attack under any provision of Part III of the Constitution. Practically all these acts related to land tenures and were concerned with agrarian reforms. This amendment was challenged before this Court in *Sajjan Singh's case*, 1965-1 SCR 933=(AIR 1965 SC 815). The points then urged were that as article 226 was likely to be affected by the Seventeenth Amendment, it required a ratification under the proviso to article 368 and that the decision in *Shankari Prasad's case*, 1952 SCR 89=(AIR 1951 SC 458) which had negated this contention required reconsideration. It was also urged that the Seventeenth Amendment was legislation with respect to land and Parliament had no right to legislate in that behalf; and further that as the Seventeenth Amendment provided that the Acts put in the Ninth Schedule would be valid inspite of the decision of the Courts, it was unconstitutional. This court by a majority of 3 to 2 upheld the correctness of the decision in *Shankari Prasad's case*, 1952 SCR 89=(AIR 1951 SC 458). It further held unanimously that the Seventeenth Amendment did not require ratification under the proviso to article 368 because of its indirect effect on article 226, and that Parliament in enacting the Amendment was not legislating with respect to land and that it was open to Parliament to validate legislation which had been declared invalid by courts. Finally this Court held by majority that the power conferred by article 368 included the power to take away fundamental rights guaranteed by Part III and that the power to amend was a very wide power and could not be controlled by the literal dictionary meaning of the word "amend" and that the word "law" in article 13(2) did not include an amendment of the Constitution made in proviso to article 368 because of its indirect effect on article 226 and of the view taken in *Shankari Prasad's case*, 1952 SCR 89=(AIR 1951 SC 458) to the effect that the word "law" in article 13(2) did not include amendment to the constitution made under article 368 and therefore doubted the competence of Parliament to make any amendment to Part III of the Constitution. One of the learned Judges further doubted whether making a change in the basic features of the Constitution could be regarded merely as an amendment or would, in effect, be re-writing a part of the constitution, and if so, whether it could be done under article 368. It was because of this doubt thrown on the correctness of the view taken in *Shankari Prasad's case*, 1952 SCR 89=(AIR 1951 SC 458) that the present reference has been made to this Special Bench.

22. 1962 Supp. (1) SCR 829=AIR 1962 SC 723.

(66) As the question referred to this Bench is of great constitutional importance and affected legislation passed by various States, notice was issued to the Advocates General of all States and they have appeared and intervened before us. Further a number of persons who were also affected by the Seventeenth Amendment have been permitted to intervene. The arguments on behalf of the petitioners and the interveners who support them may now be briefly summarised.

(67) It is urged that article 368 when it provides for the amendment of the Constitution merely contains the procedure for doing so and that the power to make amendment has to be found in article 248 read with item 97 of List I. It is further urged that the word "amendment" in article 368 means that the provisions in the Constitution can be changed so as to improve upon them and that this power is of a limited character and does not authorize Parliament to make any addition to, alteration of or deletion of any provision of the Constitution, including the provision contained in Part III. So article 368 authorizes only those amendments which have the effect of improving the Constitution. Then it is urged that amendment permissible under article 368 is subject to certain implied limitations and these limitations are basic features of the Constitution that cannot be amended at all. An attempt was made to indicate some of these basic features, as for example, the provisions in Part III, the federal structure, the republican character of the State and elected Parliament and State legislatures on the basis of adult suffrage, control by the judiciary and so on, and it is said that an amendment under article 368 is subject to the implied limitations that these basic features and others of the kind cannot be changed. Thus in effect the argument is that there is a very limited power of amendment under the Constitution.

(68) It is further urged that apart from these implied limitations, there is an express limitation under article 13(2) and the word "law" in that article includes an amendment of the Constitution. The argument thus in the alternative is that as the word "law" in article 13(2) includes a constitutional amendment, no amendment can be made in Part III under article 368 which would actually take away or abridge the rights guaranteed under that Part. In effect, it is said that even if there are no implied limitations to amend the Constitution under article 368, article 13(2) is an express limitation in so far as the power to amend Part III is concerned and by virtue of article 13(2) the rights guaranteed under Part III cannot be taken away or abridged under article 368, though it is conceded that Part III may be amended by way of enlarging the rights contained therein.

(69) Another line of argument is that in any case it was necessary to take action under the proviso to article 368 and as that was not done

the Seventeenth Amendment is not valid. It is urged that article 226 is seriously affected by the provisions contained in the Seventeenth Amendment and that amounts to an amendment of article 226 and in consequence action under the provision was necessary. It is also urged that article 245 was equally affected by the addition of a number of Acts in the Ninth Schedule read with article 13(2) and therefore also it was necessary to take action under the proviso. It is further urged that it was not competent for Parliament to amend the Constitution by putting a large number of Acts in the Ninth Schedule as the power to legislate with respect to land is solely within the competence of State legislatures and that is another reason why the addition to the Ninth Schedule read with article 31-B should be struck down.

(70) Lastly, an argument had been advanced which we may call the argument of fear. It is said that if article 368 is held to confer full power to amend each and every part of the Constitution, as has been held in *Shankari Prasad's* case, 1952 SCR 89=(AIR 1951 SC 458), Parliament may do all kinds of things, which were never intended, under this unfettered power and may, for example, abolish elected legislatures, abolish the President or change the present form of Government into a Presidential type like the United States Constitution or do away with the federal structure altogether. So it is urged that we should interpret article 368 in such a way that Parliament may not be able to do all these things. In effect this argument of fear has been put forward to reinforce the contention that this Court should hold that there are some implied limitations on the amending power and these implied limitations should be that there is no power anywhere in the Constitution to change the basic features of the Constitution to which reference has already been made. This is in brief the submission on behalf of the petitioners and the interveners who support them.

(71) The submission on behalf of the Union of India and the States may now be summarised. It is urged that article 368 not only provides procedure for amendment but also contains in it the power to amend the Constitution. It is further urged that the word "amendment" does not merely mean making such changes in the Constitution as would improve it but includes the power to make any addition to the Constitution, any alteration of any of the existing provisions and its substitution by another provision, and any deletion of any particular provision of the Constitution. In effect, it is urged that even if the word "amendment" used in article 368 does not take in the power to abrogate the entire Constitution and replace it by another new Constitution it certainly means that any provisions of the Constitution may be changed and this change can be in the form of addition to, alteration of or deletion of

any provision of the Constitution. So long, therefore, as the Constitution is not entirely abrogated and replaced by a new Constitution at one stroke the power of amendment would enable Parliament to make all changes in the existing Constitution by addition, alteration or deletion. Subject only to complete repeal being not possible, the power of amendment contained in article 368 is unfettered. It is further urged that there can be no implied limitations on the power to amend and the limitations if any on this power must be found in express terms in the article providing for amendment. It is conceded that there may be an express limitation not merely in the article providing for amendment but in some other part of the Constitution. But it is said that if that is so, there must be a clear provision to that effect. In the absence of express limitation, therefore, there can be no implied limitations on the power to amend the Constitution contained in article 368 and that power will take in all changes whether by way of addition, alteration or deletion, subject only to this that the power of amendment may not contain the power to abrogate and repeal the entire Constitution and substitute it with a new one.

(72) It is then urged that there is no express provision in article 368 itself so far as any amendment relating to the substance of the amending power is concerned; the only limitations in article 368 are as to procedure and courts can only see that the procedure as indicated in article 368 is followed before an amendment can be said to be valid. It is further urged that the word "law" in article 13 does not include an amendment of the Constitution and only means law as made under the legislative provisions contained in Chapter I of Part XI read with Chapters II and III of Part V of the Constitution and Chapters III and V of Part VI thereof. In effect it is a "law" which is made under the Constitution which is included in the word "law" in article 13(2) and not an amendment to the Constitution under article 368.

(73) As to articles 226 and 245 and the necessity of taking action under the proviso to article 368, it is urged that there is no change in articles 226 and 245 on account of any provision in the Seventeenth Amendment and therefore no action under the proviso was necessary. It is only direct change in articles 226 and 245 which would require following the procedure as to ratification or at any rate such change in other articles which would have the effect of directly compelling change in articles 226 and 245 and that in the present case no such direct compulsion arises.

(74) Lastly as to the argument of fear it is urged that there is always a provision with respect to amendment in written federal constitutions. Such a provision may be rigid or flexible. In our Constitution article 368 provides for a comparatively flexible provision for amendment and there

is no reason to make it rigid by implying any limitations on the power. Further there is no reason to suppose that all these things will be done by Parliament which are being urged to deny the power under article 368 which flows naturally from its terms.

(75) Besides the above, reliance is also placed on behalf of the Union of India and the States on the doctrine of the *stare decisis*. It is urged that since the decision of this Court in *Shankari Prasad's case*, 1952 SCR 89=(AIR 1951 SC 458) sixteen further amendments have been made by Parliament on the faith of that decision involving over 200 articles of the Constitution. The amendment relating to Part III have been mainly with respect to agrarian reforms resulting in transfers of title of millions of acres of land in favour of millions of people. Therefore, even though *Shankari Prasad's case*, 1952 SCR 89=(AIR 1951 SC 458) has stood only for fifteen years there has been a vast agrarian revolution effected on the faith of that decision and this Court should not now go back on what was decided in that case. Further besides the argument based on *stare decisis*, it is urged on the basis of certain decisions of this Court that the unanimous decision in *Shankari Prasad's case*, 1952 SCR 89=(AIR 1951 SC 458) which had stood practically unchallenged for about 15 years till the decision in *Sajjan Singh's case*, 1965-1 SCR 933=(AIR 1965 SC 845) should not be over-ruled unless it is found to be incorrect by a large majority of the Judges constituting this Special Bench. It is urged that if the present Bench is more or less evenly divided it should not over-rule the unanimous decision in *Shankari Prasad's case*, 1952 SCR 89=(AIR 1951 SC 458) by a majority of one.

(76) We shall first take article 368. It is found in Part XX of the Constitution which is headed "Amendment of the Constitution" and is the only article in that Part. That Part thus provides specifically for the amendment of the Constitution, and the first question that arises is whether it provides power for the amendment of the Constitution as well as the procedure for doing so. It is not disputed that the procedure for amendment of the Constitution is to be found in article 368, but what is in dispute is whether article 368 confers powers also in that behalf. Now the procedure for the amendment of the Constitution is this. The amendment is initiated by the introduction of a Bill in either House of Parliament. The Bill has to be passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting. After it is so passed it has to be presented to the President for his assent. On such presentation if the President assents to the Bill, article 368 provides that the Constitution shall stand amended in accordance with the terms of the Bill. Further there is a proviso for ratification with respect to certain articles



and other provisions of the Constitution including article 368, and these matters can only be amended if the Bill passed by the two Houses by necessary majority is ratified by the legislatures of not less than one half of the States by resolutions to that effect. In such a case the Bill cannot be presented for his assent to the President until necessary ratification is available. But when the necessary ratification has been made, the Bill with respect to these matters is then presented to the President and on his assent being given, the Constitution stands amended in accordance with the terms of the Bill.

(77) The argument is that there is no express provision in the terms in article 368 conferring power on Parliament to amend the Constitution, and in this connection our attention has been invited to an analogous provision in the Constitution of Ireland in article 46, where clause 1 provides that any provision of the Constitution may be amended in the manner provided in that article, and then follows the procedure for amendment in clauses 2 to 5. Reference is also made to similar provisions in other Constitutions, but it is unnecessary to refer to them. It is urged that as article 368 has nothing comparable to clause 1 of article 46 of the Irish Constitution, the power to amend the Constitution is not in article 368 and must be found elsewhere. We are not prepared to accept this argument. The fact that article 368 is not in two parts, the first part indicating that the Constitution shall be amended in the manner provided thereafter and the second part indicating the procedure for amendment, does not mean that the power to amend the Constitution is not contained in article 368 itself. The very fact that a separate part has been devoted in the Constitution for amendment thereof and there is only one article in that part shows that both the power to amend and the procedure for amendment are to be found in article 368. Besides, the words "the Constitution shall stand amended in accordance with the terms of the Bill" in article 368 clearly, in our opinion, provide for the power to amend after the procedure has been followed. It appears that our Constitution makers were apparently thinking of economy of words and elegance of language in enacting article 368 in the terms in which it appears and that is why it is not in two parts on the model of article 46 of the Irish Constitution. But there can in our opinion be a doubt, when a separate part was provided headed "Amendment of the Constitution" that the power to amend the Constitution must also be contained in article 368 which is the only article in that Part. If there was any doubt about the matter, that doubt in our opinion is resolved by the words to which we have already referred, namely, "the Constitution shall stand amended in accordance with the terms of the Bill". These words can only mean that the power is there to amend the Constitution after the procedure has been followed.

(78) It is however urged that the power to amend the constitution is not to be found in article 368 but is contained in the residuary power of Parliament in article 248 read with item 97 of List I. It is true that article 248 read with item 97 of List I, insofar as it provides for residuary power of legislation, is very wide in its scope, and the argument that the power to amend the Constitution is contained in this provision appears *prima facie* attractive in view of the width of the residuary power. But we fail to see why when there is a whole part devoted to the amendment of the Constitution the power to amend should not be found in that Part, if it can be reasonably found there and why article 368 should only be confined to providing for procedure for amendment. It is true that the marginal note to article 368 is "procedure for amendment of the Constitution," but the marginal note cannot control the meaning of the words in the article itself, and we have no doubt that the words "the Constitution shall stand amended in accordance with the terms of the Bill" to be found in article 368 confer the power of amendment. If we were to compare the language of clauses 2 to 5 of article 46 of the Irish Constitution which prescribes the procedure for amendment, we find no words therein comparable to these words in article 368. These words clearly are comparable to clause 1 of article 46 of the Irish Constitution and must be read as conferring power on Parliament to amend the Constitution. Besides it is remarkable in contrast that article 248 read with List I does not in terms mention the amendment of the Constitution. While therefore there is a whole part devoted to the amendment of the Constitution, we do not find any specific mention of the amendment of the Constitution in article 248 or in any entry of List I. It would in the circumstances be more appropriate to read the power in article 368 in view of the words which we have already referred to than in article 248 read with item 97 of List I. Besides it is a historical fact to which we can refer that originally the intention was to vest residuary power in States, and if that intention had been eventually carried out, it would have been impossible for any one to argue that the power to amend the Constitution was to be found in the residuary power if it had been vested in the states and not in the Union. The mere fact that during the passage of the Constitution by the Constituent Assembly, residuary power was finally vested in the Union would not therefore mean that it includes the power to amend the Constitution. On a comparison of the scheme of the words in article 368 and the scheme of the words in article 248 read with item 97 of List I, therefore, there is no doubt in our mind that both the procedure and power to amend the Constitution are to be found in article 368 and they are not to be

(79) There is in our opinion another reason why the power to amend the Constitution cannot be found in article 248 read with item 97 of List I. The Constitution is the fundamental law and no law passed under mere legislative power conferred by the Constitution can affect any change in the Constitution unless there is an express power to that effect given in the Constitution itself. But subject to such express power given by the Constitution itself, the fundamental law, namely the Constitution, cannot be changed by a law passed under the legislative provisions contained in the Constitution as all legislative acts passed under the power conferred by the Constitution must conform to the Constitution, can make no change therein. There are a number of articles in the Constitution, which expressly provide for amendment by law, as, for example, 3,4,10,59(3), 65(3), 73(2), 97,98(3), 106,120(2),135,137,142(1), 146(2), 148(3), 149, 169, 171(2), 186, 187(3), 189(3), 194(3), 195, 210(2) 221(2), 225, 229(2), 239(1), 241(3), 283(1) and (2), 285(2), 287, 300(1), 313,345,373, Schedule V, clause 7 and Schedule VI, clause 21; and so far as these articles are concerned they can be amended by Parliament by ordinary law-making process. But so far as the other articles are concerned they can only be amended by amendment of the Constitution under article 368. Now article 245 which gives power to make law for the whole or any part of the territory of India by Parliament is "subject to the provisions of this Constitution" and any law made by Parliament whether under article 246 read with List I or under article 248 read with item 97 of List I must be subject to the provisions of the Constitution. If therefore the power to amend the Constitution is contained in article 248 read with item 97 of List I, that power has to be exercised subject to the provisions of the Constitution and cannot be used to change fundamental law (namely, the Constitution) itself. But it is argued that article 368 which provides a special procedure for amendment of the Constitution should be read along with articles 245 and 248, and so read it would be open to amend any provision of the Constitution by law passed under article 248 on the ground that article 248 is subject to article 368 and therefore the two together give power to Parliament to pass a law under article 248 which will amend even those provisions of the Constitution which are not expressly made amendable by law passed under the legislative power of Parliament. This in our opinion is arguing in a circle. If the fundamental law (i.e. the Constitution) cannot be changed by any law passed under the legislative powers contained therein, for legislation so passed must conform to the fundamental law, we fail to see how a law passed under the residuary power, which is nothing more than legislative power conferred on Parliament under the Constitution, can change the Constitution (namely, the fundamental law) itself.

(78) It is however urged that the power to amend the constitution is not to be found in article 368 but is contained in the residuary power of Parliament in article 248 read with item 97 of List I. It is true that article 248 read with item 97 of List I, insofar as it provides for residuary power of legislation, is very wide in its scope, and the argument that the power to amend the Constitution is contained in this provision appears *prima facie* attractive in view of the width of the residuary power. But we fail to see why when there is a whole part devoted to the amendment of the Constitution the power to amend should not be found in that Part, if it can be reasonably found there and why article 368 should only be confined to providing for procedure for amendment. It is true that the marginal note to article 368 is "procedure for amendment of the Constitution," but the marginal note cannot control the meaning of the words in the article itself, and we have no doubt that the words "the Constitution shall stand amended in accordance with the terms of the Bill" to be found in article 368 confer the power of amendment. If we were to compare the language of clauses 2 to 5 of article 46 of the Irish Constitution which prescribes the procedure for amendment, we find no words therein comparable to these words in article 368. These words clearly are comparable to clause 1 of article 46 of the Irish Constitution and must be read as conferring power on Parliament to amend the Constitution. Besides it is remarkable in contrast that article 248 read with List I does not in terms mention the amendment of the Constitution. While therefore there is a whole part devoted to the amendment of the Constitution, we do not find any specific mention of the amendment of the Constitution in article 248 or in any entry of List I. It would in the circumstances be more appropriate to read the power in article 368 in view of the words which we have already referred to than in article 248 read with item 97 of List I. Besides it is a historical fact to which we can refer that originally the intention was to vest residuary power in States, and if that intention had been eventually carried out, it would have been impossible for any one to argue that the power to amend the Constitution was to be found in the residuary power if it had been vested in the states and not in the Union. The mere fact that during the passage of the Constitution by the Constituent Assembly, residuary power was finally vested in the Union would not therefore mean that it includes the power to amend the Constitution. On a comparison of the scheme of the words in article 368 and the scheme of the words in article 248 read with item 97 of List I, therefore, there is no doubt in our mind that both the procedure and power to amend the Constitution are to be found in article 368 and they are not to be found in article 248 read with item 97 of List I which provides for residuary legislative power of Parliament.

The argument is that constitutional amendment is also passed by the two Houses of Parliament, and is assented to by the President like ordinary legislation, with this difference that a special majority is required for certain purposes and a special majority plus ratification is required for certain other purposes. It may be admitted that the procedure for amendment under article 368 is somewhat similar to the procedure for passing ordinary legislation under the constitution. Even so, as pointed out by Sir Ivor Jennings in the passage already quoted, there is a clear separation between constitutional law and the rest of the law and that must never be forgotten. An amendment to the Constitution is a constitutional law and as observed in *Shankari Prasad's case*, 1952 SCR 89= (AIR 1951 SC 458) is in exercise of constituent power; passing of ordinary law is in exercise of ordinary legislative power and is clearly different from the power to amend the Constitution. We may in this connection refer for example to article V of the U.S. Constitution, which provides for the amendment thereof. It will be clearly seen that the power contained in article V of the U.S. Constitution is not ordinary legislative power and no one can possibly call it ordinary legislative power, because the procedure provided for the amendment of the Constitution in article V differs radically from the procedure provided for ordinary legislation, for example, the President's assent is not required for constitutional amendment under article V of the U.S. Constitution. Now if article 368 also had made a similar departure from the procedure provided for ordinary legislation, it could never have been said that article 368 merely contained the procedure for amendment and that what emerges after that procedure is followed is ordinary law of the same quality and nature as emerges after following the procedure for passing ordinary law. If, for example, the assent of the President which is to be found in article 368 had not been there and the Constitution would have stood amended after the Bill had been passed by the two Houses by necessary majority and after ratification by not less than one-half of the States where so required, it could never have been argued that the power to amend the Constitution was contained in articles 245 and 248 read with item 97 of List I and article 368 merely contained the procedure.

(82) We are however of opinion that we should look at the quality and nature of what is done under article 368 and not lay so much stress on the similarity of the procedure contained in article 368 with the procedure for ordinary law making. If we thus look at the quality and nature of what is done under article 368, we find that it is the exercise of constituent power for the purpose of amending the constitution itself and is very different from the exercise of ordinary legislative power for

(80) We may in this connection refer to the following passage in the *Law and the Constitution* by W. Ivor Jennings (1933 Ed) at p. 51 onwards:—

“A written Constitution is thus the fundamental law of a country; the express embodiment of the doctrine of the reign of law. All public authorities—legislative, administrative and judicial—take their powers directly or indirectly from it.....Whatever the nature of the written constitution it is clear that there is a fundamental distinction between constitutional law and the rest of the law..... There is a clear separation, therefore, between the constitutional law and the rest of the law.”

It is because of this difference between the fundamental law (namely, the Constitution) and the law passed under the legislative provisions of the Constitution that it is not possible in the absence of an express provision to that effect in the fundamental law to change the fundamental law by ordinary legislation passed thereunder, for such ordinary legislation must always conform to the fundamental law (*i.e.* the Constitution). If the power to amend the Constitution is not to be found in article 248 read with item 97 of List I it will mean that ordinary legislation passed under the fundamental law would amend that law and this cannot be done unless there is express provision as in article 3 etc. to that effect. In the absence of such express provision any law passed under the legislative powers granted under the fundamental law cannot amend it. So if we were to hold that the power to amend the Constitution is comprised in article 248, that would mean that no amendment of the Constitution would be possible at all except to the extent expressly provided in various articles to which we have referred already, for the power to legislate under article 245 read with article 248 is itself subject to the Constitution. Therefore, reading article 368 and considering the scheme of the legislative powers conferred by articles 245 and 248 read with item 97 of List I, this to our mind is clear, firstly that the power to amend the Constitution is to be found in article 368 itself, and secondly, that the power to amend the Constitution can never reside in article 245 and article 248 read with item 97 of List I, for that would make any amendment of the Constitution impossible except with respect to the express provisions contained in certain articles thereof for amendment by law.

(81) We may in this connection add that all this argument that power to amend the Constitution is to be found in article 245 and article 248 read with item 97 of List I has been based on one accidental circumstance, and that accidental circumstance is that the procedure for amendment of the Constitution contained in article 368 is more or less assimilated to the procedure for making ordinary laws under the Constitution.

(84) We thus see that in one respect at any rate article 368 even on its present terms differs from the power of the President in connection with ordinary legislation under the Constitution and that is if the President withholds his assent the Bill for amendment of the Constitution immediately falls. We cannot accept that the procedure provided under the proviso to article 111 can apply in such a case, for this much cannot be disputed that so far as the procedure for amendment of the Constitution is concerned we must look to article 368 only and nothing else. In any case the mere fact that the procedure in article 368 is very much assimilated to the procedure for passing ordinary legislation is no reason for holding that what emerges after the procedure under article 368 is followed is ordinary law and no more. We repeat that we must look at the quality and nature of what is done under article 368, and that is, the amendment of the Constitution. If we look at that we must hold that what emerges is not ordinary law passed under the Constitution but something which has the effect of amending the fundamental law itself which could not be done by ordinary legislative process under the Constitution unless there is express provision to that effect. We have already referred to such express provisions in various articles, but article 368 cannot be treated as such an article, for it deals specifically with the amendment of the Constitution as a whole.

(85) It is also remarkable to note in this connection that the word "law" which has been used in so many articles of the Constitution has been avoided apparently with great care in article 368. We again refer to the concluding words of the main part of article 368 which says that the "Constitution shall stand amended in accordance with the terms of the Bill". Now it is well-known that in the case of ordinary legislation as soon as the Bill is passed by both Houses and has received the assent of the President it becomes an Act. But article 368 provides that as soon as the Bill for amendment of the Constitution has been passed in accordance with the procedure provided therein the Constitution shall stand amended in accordance with the terms of the Bill. These words in our opinion have significance of their own. It is also remarkable that these words clearly show the difference between the quality of what emerges after the procedure under article 368 is followed and what happens when ordinary law-making procedure is followed. Under article 111, in the case of ordinary law-making when a Bill is passed by the two Houses of Parliament it is presented to the President and the President shall declare either that he assents to the Bill or that he withholds assent therefrom. But it is remarkable that article 111 does not provide that when the Bill has been assented to by the President it becomes an Act. The reason for this is that the Bill assented to by the President though it may become law is still not declared article 111 to be a law, for such

passing laws which must be in conformity with the Constitution and cannot go against any provision thereof, unless there is express provision to that effect to which we have already referred. If we thus refer to the nature and quality of what is done under article 368, we immediately see that what emerges after the procedure in article 368 is gone through is not ordinary law which emerges after the legislative procedure contained in the Constitution is gone through. Thus article 368 provides for the coming into existence of what may be called the fundamental law in the form of an amendment of the Constitution and therefore what emerges after the procedure under article 368 is gone through is not ordinary legislation but an amendment of the Constitution which becomes a part of the fundamental law itself, by virtue of the words contained in article 368 to the effect that the Constitution shall stand amended in accordance with the terms of the Bill.

(83) It is urged in this connection on behalf of the Union of India that even though the assent of the President is required under article 368, the President must assent thereto and cannot withhold his assent as is possible in the case of ordinary law in view of article 111 of the Constitution, for the words "that he withholds assent therefrom" found in article 111 are not to be found in article 368. It is however difficult to accept the argument on behalf of the Union that the President cannot withhold his assent when a Bill for amendment of the Constitution is presented to him. Article 368 provides that a bill for the amendment of the Constitution shall be presented to the President for his assent. It further provides that upon such assent by the President, the Constitution shall stand amended. That in our opinion postulates that if assent is not given, the Constitution cannot be amended. Whether a President will ever withhold his assent in our form of Government is a different matter altogether, but as we read article 368 we cannot hold that the President is bound to assent and cannot withhold his assent when a bill for amendment of the Constitution is presented to him. We are of the opinion that the President can refuse to give his assent when a Bill for amendment of the Constitution is presented to him, the result being that the Bill altogether falls, for there is no specific provision for anything further to be done about the Bill in article 368 as there is in article 111. We may in this connection refer to the different language used in clause 5 of article 46 of the Irish Constitution which says that "a Bill containing a proposal for the amendment of this Constitution shall be signed by the President forthwith upon his being satisfied that the provisions of this article have been complied with in respect thereof." It will be seen therefore that if the intention under article 368 had been that the President cannot withhold his assent, we would have found language similar in terms to that in clause 5 of article 46 of the Irish Constitution.



conferred on Parliament and whether there are any limitations on it—express or implied—will be considered by us presently. But we have no doubt without entering into the question of sovereignty and of whether article 368 confers the same sovereign power on Parliament the Constituent Assembly had when framing the Constitution, that article 368 does confer power on Parliament subject to the procedure provided therein for amendment of any provision of the Constitution.

(87) This brings us to the scope and extent of the power conferred for amendments under article 368. It is urged that article 368 only gives power to amend the Constitution. Recourse is had on behalf of the petitioners to the dictionary meaning of the word "amendment". It is said that amendment implies and means improvement in detail and cannot take in any change in the basic features of the constitution. Reference in this connection may be made to the following meaning of the word "amend" in the Oxford English Dictionary namely, "to make professed improvements in a measure before Parliament; formally, to alter in detail, though practically it may be to alter its principle, so as to thwart it". This meaning at any rate does not support the case of the petitioners that amendment merely means such change as results in improvement in detail. It shows that in law, though amendment may professedly be intended to make improvements and to alter only in detail, in reality, it may make a radical change in the provision which is amended. In any case, as was pointed out in *Sajjan Singh's case*, 1965-1 SCR 933= (AIR 1965 SC 845) the word "amend" or "amendment" is well understood in law and will certainly include any change whether by way of addition or alteration or deletion of any provision in the Constitution. There is no reason to suppose that when the word "amendment" of the Constitution was being used in article 368, the intention was to give any meaning less than what we have stated above. To say that "amendment" in law only means a change which results in improvement would make amendments impossible, for what is improvement of an existing law is a matter of opinion and what, for example, the legislature may consider an improvement may not be so considered by others. It is, therefore, in our opinion impossible to introduce in the concept of amendment as used in article 368 any idea of improvement as to details of the Constitution. The word "amendment" used in article 368 must, therefore, be given its full meaning as used in law and that means that by amendment an existing constitution or law can be changed and this change can take the form either of addition to the existing provisions, or alteration of existing provisions and their substitution by others or deletion of certain provisions altogether. In this connection reference has been made to contrast certain other provisions of the Constitution, where, for example, the word "amend" has been followed by such words as "by way of

law is open to challenge in courts on various grounds, namely, on the ground that it violates any fundamental rights, or on the ground that Parliament was not competent to pass it or on the ground that it is in breach of any provision of the Constitution. On the other hand we find that when a Bill for the amendment of the Constitution is passed by requisite majority and assented to by the President, the Constitution itself declares that the Constitution shall stand amended in accordance with the terms of the Bill. Thereafter what Courts can see is whether the procedure provided in article 368 has been followed for if that is not done, the Constitution cannot stand amended in accordance with the terms of the Bill. But if the procedure has been followed, the Constitution stands amended, and there is no question of testing the amendment of the Constitution thereafter on the anvil of fundamental rights or in any other way as in the case of ordinary legislation. In view of all this we have no doubt that even though by accident the procedure provided in the Constitution for amendment thereof is very akin to the procedure for passing ordinary legislation, the power contained in article 368 is still not ordinary legislative power but constituent power for the specific purpose of the amendment of the Constitution; and it is the quality of that power which determines the nature of what emerges after the procedure in article 368 has been followed and what thus emerges is not ordinary legislation but fundamental law which cannot be tested, for example, under article 13(2) of the Constitution or under any other provision of the Constitution.

(86) We may briefly refer to an argument on behalf of the Union of India that the amending power contained in article 368 is the same sovereign power which was possessed by the Constituent Assembly when it made the Constitution and therefore it is not subject to any fetters of any kind. We do not think it necessary to enter into the academic question as to where sovereignty resides and whether legal sovereignty is in the people and political sovereignty in the body which has the power to amend the Constitution and *vice versa*. In our view the words of article 368 clearly confer the power to amend the Constitution and also provide the procedure for doing so, and that in our opinion is enough for the purpose of deciding whether the seventeenth amendment is valid or not. Further as we have already stated, the power conferred under article 368 is constituent power to change the fundamental law *i.e.* the Constitution, and is distinct and different from the ordinary legislative power conferred on Parliament by various other provisions in the Constitution. So long as this distinction is kept in mind Parliament would have the power under article 368 to amend the Constitution and what Parliament does under article 368 is not ordinary law-making which is subject to article 13(2) or any other articles of the Constitution. What is the extent of the power

any implied limitations on the power of amendment contained in article V of the U.S. Constitution. There are two lines of thought in this matter in the United States. Some jurists take the view that there are certain implied limitations of the power to amend contained in article V of the U.S. Constitution. These are said to be with respect to certain basic features, like the republican character of Government, the federal structure, etc. On the other hand, it appears that the more prevalent view amongst jurists in the United States is that there are no implied limitations on the scope of the amending power in article V of the U.S. Constitution. Willis on *The Constitutional Law of the United States of America* (1936 Edition) says that probably the correct position is that the amending power embraces everything; in other words there are no legal limitations whatever on the power of amendment, except what is expressly provided in article V (see discussion on pp. 122 to 127). Even with respect to these express limitations, Munro in the *Government of the United States* (Fifth Edition) at p. 77 says that even these express limitations can be removed and one of the ways of doing so is "to remove the exception by a preliminary amendment and thus clear the way for further action." Besides, as a matter of fact there is no decision of the Supreme Court of the United States holding that there are implied limitations on the power of amendment contained in article V of the U.S. Constitution and all amendments so far made in the United States have been upheld by the Supreme Court there in the few cases that have been taken to it for testing the validity of the amendments.

(91) We have given careful consideration to the argument that certain basic features of our Constitution cannot be amended under article 368 and have come to the conclusion that no limitations can be and should be implied upon the power of amendment under article 368. One reason for coming to this conclusion is that if we were to accept that certain basic features of the Constitution cannot be amended under article 368, it will lead to the position that any amendment made to any article of the Constitution would be liable to challenge before courts on the ground that it amounts to amendment of the basic feature. Parliament would thus never be able to know what amendments it can make in the Constitution and what it cannot; for till a complete catalogue of basic features of the Constitution is available, it would be impossible to make any amendment under article 368 with any certainty that it would be upheld by Courts. If such an implied limitation were to be put on the power of amendment contained in article 368, it would only be the courts which would have the power to decide what are basic features of the Constitution and then to declare whether a particular amendment is valid or not on the ground that it amends a particular basic feature or not. The result would be that every amendment made in the Constitution

addition, variance or repeal" (see Sixth Schedule, paragraph 21) and more or less similar expressions in other articles of the Constitution. It is very difficult to say why this was done. But the fact that no such words appear in article 368 does not in our mind make any difference, for the meaning of the word "amendment" in law is clearly as indicated above by us and the presence or absence of explanatory words of the nature indicated above do not in our opinion make any difference.

(88) The question whether the power of amendment given by article 368 also includes the power to abrogate the Constitution completely and to replace it by an entirely new Constitution, does not really arise in the present case, for the Seventeenth Amendment has not done any such thing and need not be considered. It is enough to say that it may be open to doubt whether the power of amendment contained in article 368 goes to the extent of completely abrogating the present constitution and substituting it by an entirely new one. But short of that, we are of opinion that the power to amend includes the power to add any provision to the Constitution, to alter any provision and substitute any other provision in its place and to delete any provision. The Seventeenth Amendment is merely in exercise of the power of amendment as indicated above and cannot be struck down on the ground that it goes beyond the power conferred on Parliament to amend the Constitution by article 368.

(89) The next question that arises is whether there is any limitation on the power of amendment as explained by us above. Limitations may be of two kinds, namely, express or implied. So far as express limitations are concerned, there are none such in article 368. When it speaks of the "amendment of this Constitution" it obviously and clearly refers to amendment of any provision thereof, including the provisions contained in Part III relating to fundamental rights. Whether article 13(2) is an express limitation on the power of amendment will be considered by us later, but so far as article 368 is concerned, there are no limitations whatsoever in the matter of substance on the amending power and any provision of the Constitution, be it in part III and any other part, can be amended under article 368.

(90) The next question is whether there are any implied limitations on the power of amendment contained in article 368, and this brings us to the argument that there are certain basic features of the Constitution which cannot be amended at all and there is an implied limitation on the power of amendment contained in article 368 so far as these basic features are concerned. We may in this connection refer to the view prevailing amongst jurists in the United States of America as to whether there are

(93) In *Administrator-General of Bengal v. Prem Lal Mullick*<sup>22</sup>, the Privy Council held that "proceedings of the legislature cannot be referred to as legitimate aids to the construction of the Act in which they result."

(94) In *Baxter v. Commissioner of Taxation*,<sup>23</sup> it was said that reference to historical facts can be made in order to interpret a statute. There was, however, no reference to the debates in order to arrive at the meaning of a particular provision of the Constitution there in dispute.

(95) In *A. K. Gopalan v. The State of Madras*: 1950 SCR 88=(AIR SC 27) (see supra) *Kania C. J.* referring to the debates and reports of the Drafting Committee of the Constituent Assembly in respect of the words of article 21 observed at p. 110 that they might not be read to control the meaning of the article. In that case all that was accepted was that "due process of law" which was a term used in the U.S. Constitution, was not accepted for the purposes of article 21 which used the words "the procedure established by law." Patanjali Sastri J. (at p. 202) also refused to look at the debates and particularly the speeches made in order to determine the meaning of article 21. Fazl Ali J. (at p. 158) was of opinion that the proceedings and discussions in the Constituent Assembly were not relevant for the purposes of construing the expressions used in article 21.

(96) Again in *Automobile Transport (Rajasthan) Ltd. v. The State of Rajasthan*, 1963-1 SCR 491: (AIR 1962 SC 1406), this Court looked into the historical background but refused to look into the debates in order to determine the meaning of the provisions of the Constitution in dispute in that case.

(97) We are, therefore, of opinion that it is not possible to read the speeches made in the Constituent Assembly in order to interpret article 368 or to define its extent and scope and to determine what it takes in and what it does not. As to the historical facts, namely, what was accepted or what was avoided in the Constituent Assembly in connection with article 368, it is enough to say that we have not been able to find any help from the material relating to this. There were proposals for restricting the power of amendment under article 368 and making fundamental rights immune therefrom and there were counter proposals before the Constituent Assembly for making the power of amendment all embracing. They were all either dropped or negatived and in the circumstances are of no help in determining the interpretation of article 368 which must be interpreted on the words thereof as they finally found place in the Constitution, and

22. (1895) 22 Ind App 107 (PC).

23. (1907) 4 Com-W LR 1087.

would provide a harvest of legal wrangles so much so that Parliament may never know what provisions can be amended and what cannot. The power to amend being a constituent power cannot in our opinion for these reasons be held subject to any implied limitations thereon on the ground that certain basic features of the Constitution cannot be amended. We fail to see why if there was any intention to make any part of the Constitution unamendable, the Constituent Assembly failed to indicate it expressly in article 368. If, for example, the Constitution-makers intended certain provisions in the Constitution, and Part III in particular, to be not amendable, we can see no reason why it was not so stated in article 368. On the clear words of article 368 which provides for amendment of the Constitution which means any provision thereof, we cannot infer any implied limitations on the power of amendment of any provision of the Constitution, be it basic or otherwise. Our conclusion is that constituent power, like that contained in article 368, can only be subject to express limitations and not to any implied limitations so far as substance of the amendments are concerned and in the absence of anything in article 368 making any provision of the Constitution unamendable, it must be held that the power to amend in article 368 reaches every provision of the Constitution and can be used to amend any provision thereof, provided the procedure indicated in article 368 is followed.

(92) Copious references were made during the course of arguments to debates in Parliament and it is urged that it is open to this Court to look into the debates in order to interpret article 368 to find out the intention of the Constitution makers. We are of opinion that we cannot and should not look into the debates that took place in the Constituent Assembly to determine the interpretation of article 368 and the scope and extent of the provision contained therein. It may be conceded that historical background and perhaps what was accepted or what was rejected by the Constituent Assembly while the Constitution was being framed, may be taken into account in finding out the scope and extent of article 368. But we have no doubt that what was spoken in the debates in the Constituent Assembly cannot and should not be looked into in order to interpret article 368. Caries on *Statute Law* (Sixth Edition, at p.128) says that "it is not permissible in discussing the meaning of an obscure enactment to refer to 'Parliamentary history' of a statute, in the sense of the debates which took place in Parliament when the Statute was under Consideration", and supports his view with reference to a large number of English cases. The same view of Maxwell on *Interpretation of Statutes*, (11th Edition, p. 26). Crawford on *Statutory Construction* (1940 Edition, at p. 340) says that resort may not be had to debates to ascertain legislative intent, though historical background in which the legislation came to be passed, can be taken into consideration.

(93) In *Administrator-General of Bengal v. Prem Lal Mullick*<sup>22</sup>, the Privy Council held that "proceedings of the legislature cannot be referred to as legitimate aids to the construction of the Act in which they result."

(94) In *Baxter v. Commissioner of Taxation*,<sup>23</sup> it was said that reference to historical facts can be made in order to interpret a statute. There was, however, no reference to the debates in order to arrive at the meaning of a particular provision of the Constitution there in dispute.

(95) In *A. K. Gopalan v. The State of Madras*: 1950 SCR 88=(AIR SC 27) (see supra) *Kania C. J.* referring to the debates and reports of the Drafting Committee of the Constituent Assembly in respect of the words of article 21 observed at p. 110 that they might not be read to control the meaning of the article. In that case all that was accepted was that "due process of law" which was a term used in the U.S. Constitution, was not accepted for the purposes of article 21 which used the words "the procedure established by law." Patanjali Sastri J. (at p. 202) also refused to look at the debates and particularly the speeches made in order to determine the meaning of article 21. Fazl Ali J. (at p. 158) was of opinion that the proceedings and discussions in the Constituent Assembly were not relevant for the purposes of construing the expressions used in article 21.

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(97) We are, therefore, of opinion that it is not possible to read the speeches made in the Constituent Assembly in order to interpret article 368 or to define its extent and scope and to determine what it takes in and what it does not. As to the historical facts, namely, what was accepted or what was avoided in the Constituent Assembly in connection with article 368, it is enough to say that we have not been able to find any help from the material relating to this. There were proposals for restricting the power of amendment under article 368 and making fundamental rights immune therefrom and there were counter proposals before the Constituent Assembly for making the power of amendment all embracing. They were all either dropped or negatived and in the circumstances are of no help in determining the interpretation of article 368 which must be interpreted on the words thereof as they finally found place in the Constitution, and

22. (1895) 22 Ind App 107 (PC).

23. (1907) 4 Com-W LR 1087.

on those words we have no doubt that there are no implied limitations of any kind on the power of amendment given therein.

(98) An argument is also raised that limitations on the power to amend the Constitution can be found in the Preamble to the Constitution. As to that we may refer only to *In re: Berubari Union of Exchange of Enclaves*,<sup>24</sup> with respect to the value of the Preamble to the Constitution and its importance therein. It was observed in that case unanimously by a Bench of nine Judges that "although it may be correct to describe the Preamble as a key to the mind of the Constitution-makers, it forms no part of the Constitution and cannot be regarded as the source of any substantive power which the body of the Constitution alone can confer on the Government, expressly or by implication. This is equally true to prohibitions and limitations". The Court there was considering whether the Preamble could in any way limit the power of Parliament to cede any part of the national territory and held that it was not correct to say that the Preamble could in any way limit the power of Parliament to cede parts of the national territory." On a parity of reasoning we are of opinion that the Preamble cannot prohibit or control in any way or impose any implied prohibitions or limitations on the power to amend the Constitution contained in article 368.

(99) This brings us to the question whether the word "law" in article 13(2) includes an amendment of the Constitution, and, therefore, there is an express provision in article 13(2) which at least limits the power of amendment under article 368 to this extent that by such amendment fundamental rights guaranteed by Part III cannot be taken away or abridged. We have already pointed out that in *Shankari Prasad's case*, 1952 SCR 89: (AIR 1951 SC 458), as well as *Sajjan Singh's case*, 1965-1 SCR 933 = (AIR 1965 SC 845), it has already been held, in one case unanimously and in the other by majority, that the word "law" in article 13(2) does not include an amendment of the Constitution, and it is the correctness of this view which is being impugned before this Bench. Article 13 is in three parts. The first part lays down that all laws in force in the territory of India immediately before the commencement of this Constitution, insofar as they are inconsistent with the provisions of this part, shall to the extent of such inconsistency be void". Further all previous constitutional provisions were repealed by article 395 which provided that "the Indian Independence Act, 1947, and the Government of India Act, 1935, together with all enactments amending or supplementing the latter Act, but not including the Abolition of Privy Council Jurisdiction Act, 1949, are hereby repealed". Thus it is clear that the word "law" in article

24. (1960) 3 SCR 250 (AIR 1960 SC 845.)



13(1) does not include any law in the nature of a constitutional provision for no such law remained after the repeal in article 395.

(100) Then comes the second part of article 13, which says that "the State shall not make any law which takes or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void". The third part defines the word "law" for the purpose of article 13; the definition is inclusive and not exhaustive. It is because of the definition in clause (3) of article 13 being inclusive that it is urged that the word "law" in article 13(2) includes an amendment of the Constitution also. Now we see no reason why if the word "law" in article 13(1) relating to past laws does not include any constitutional provision the word "law" in clause (2) would take in an amendment of the Constitution, for it would be reasonable to read the word "law" in the same sense in the first two clauses of article 13. But apart from this consideration, we are of opinion that the word "law" in article 13(2) could never have been intended to take in an amendment of the Constitution. What article 13(2) means is that a law made under the constitutional provisions would be tested on the anvil of Part III and if it takes away or abridge the rights conferred by Part III it would be void to the extent of the contravention. There are many articles in the Constitution which provide directly for making law in addition to articles 245, 246 and 248 etc., and the three Lists and article 13(2) prohibits the State from making any law under these provisions. We see no difficulty in the circumstances in holding that article 13(2) when it talks of the State making any law, refers to the law made under the provisions contained in Chapter I of Part XI of the Constitution beginning with article 245 and also other provisions already referred to earlier. Article 246 provides that Parliament may make laws for the whole or any part of the territory of India and the legislature of a State may make laws for the whole or any part of the State. Articles 246(1) gives exclusive power to Parliament to make laws with respect to subjects enumerated in List I. Articles 246(3) gives exclusive power to State Legislatures to make laws with respect to List II. Article 248(1) gives exclusive power to Parliament to make laws with respect to any matter not enumerated in the Concurrent List or the State List. We are referring to these provisions merely to show that the various provisions in Chapter I of Part XI provide for making laws, and these laws are all laws which are made under the legislative power conferred on Parliament or on State Legislatures under the Constitution. Therefore when in article 13(2) it is said that the State shall not make any law (State there including Parliament and legislature of each State), its meaning could only take in laws made by Parliament and State Legislatures under the powers conferred under Chapter I of Part XI and also other provisions already referred

to earlier. We have already held that the power to amend the Constitution is to be found in article 368 along with the procedure and that such power is not to be found in article 248 read with item 97 of List I. Therefore an amendment of the Constitution is not an ordinary law made under the powers conferred under Chapter I of the Part XI of the Constitution and cannot be subject to article 13(2) where the word "law" must be read as meaning law made under the ordinary legislative power. We have already referred to a large number of articles where Parliament is given the power to make law with respect to those articles. So far as this power of Parliament is concerned it is ordinary legislative power and it will certainly be subject to article 13(2). But there can in our opinion be no doubt that when article 13(2) prohibits the State from making any law which takes away or abridges rights conferred by Part III, it is only referring to ordinary legislative power conferred on Parliament and legislatures of States and cannot have any reference to the constituent power for amendment of the Constitution contained in article 368.

(101) We have already pointed out that there are no implied limitations on the power to amend under article 368 and it is open to Parliament under that article to amend any part of the Constitution, including Part III. It is worth remembering that a whole Part XX is devoted by the Constitution-makers to the subject of amendment of the Constitution. If it was their intention that Part III of the Constitution will not be liable to amendment by way of abridgement or abrogation under the amending power contained in article 368 we see no reason why an express provision to that effect was not made in article 368. We cannot see what prevented the Constituent Assembly from making that clear by an express provision in article 368. It is, however, said that it was not necessary to say so in article 368, because the provision was already made in article 13(2). We are unable to accept this contention, for we have no doubt that article 13(2), when it refers to making of laws is only referring to the ordinary legislative power and not to the constituent power which results in amendment of the Constitution. In any case it seems to us somewhat contradictory that in article 368 power should have been given to amend any provision of the Constitution without any limitations but indirectly that power is limited by using words of doubtful import in article 13(2). It is remarkable that in article 13(2) there is no express provision that amendment of the Constitution, under article 368, would be subject thereto. It seems strange indeed that no express provision was made in Part XX in this matter and even in article 13(2) no express provision is made to this effect, and in both places the matter is left in a state of uncertainty. It is also remarkable that in article 368 the word "law" which we find so often used in so many articles of the Constitution is conspicuously avoided, and it is specifically provided that

after the procedure has been gone through the Constitution shall stand amended in accordance with the terms of the Bill. This language of article 368 is very significant and clearly makes a distinction between a constitutional amendment and an ordinary law passed as an Amending Act. The validity of a law has to be determined at the time when the Bill actually matures into an Act and not at the stage while it is still a Bill. The Provision in article 368 has the effect that when a Bill amending the Constitution receives the assent of the President, the Constitution stands amended in accordance with the terms of the Bill. The Constitution thus stands amended in terms of the Bill if the Bill has been introduced, passed and assented to by the President in accordance with the procedure laid down in article 368, and not as a result of the Bill becoming an Amendment Act introducing amendment in the Constitution. The provision that the Constitution shall stand amended in terms of the Bill was thus clearly intended to indicate that the amendment of the Constitution is not dependent on the Bill being treated as a law or an Act duly passed by the Parliament. Thus it is clear that by indication that the Constitution is to stand amended in accordance with the terms of the Bill, article 368 clearly envisages that the power of amendment of the Constitution stands on an entirely different footing from the ordinary law made by Parliament in exercise of its legislative power.

(102) If we keep in mind this difference between a constitutional amendment or constitutional law and an ordinary amending Act or law, it should not be difficult to hold that when article 13(2) speaks of the State making a law, it is referring to ordinary law made under the powers conferred by article 245, etc., read with various Lists and various provisions of the Constitution where express provision to that effect has been made and is not referring to the amendment of the Constitution which is made under the constituent power. Once it is held that the power to amend is found in article 368 and is not to be found in article 248 read with Items 97 of List I, it must follow that the power to amend the Constitution under article 368 is a different power (namely, constituent power) and when article 13(2) speaks of making law, it can only refer to making ordinary law, particularly when we compare the words of article 13(2) (namely, the State shall not make any law) and the words of articles 245, 248 and 250 which all speak of Parliament making law, State legislatures making law and so on.

(103) Lastly, as the power to amend is in article 368 and on the words, as they stand in that article, that power is unfettered and includes the power to amend Part III, it is strange that that power should be limited by putting an interpretation on the word "law" in article 13(2), which would include constitutional law also. There is nothing to suggest this even in the inclusive definition of the words "law" and "laws in

force" in article 13(3). Besides it is conceded on behalf of the Petitioners that article 368 gives power to amend Part III, but that power is not only to amend one way, namely towards enlargement of the rights contained therein, and not the other way namely, for abridging or taking away the rights contained therein. We must say that it would require a very clear provision in the Constitution to read the power to amend the Constitution relating to Part III in this manner. We cannot find that clear provision in article 13(2). We repeat that when the Constituent Assembly was taking the trouble of providing a whole Part for amendment of the Constitution and when the words in article 368 clearly give the power to amend the Constitution and are subject to no implied limitations and contain no express limitations, it is strange indeed that it should have omitted to provide in that very article that Part III is not liable to amendment thereunder. In any case if the power of amendment conferred by the words of article 368 is unfettered, we must avoid any inconsistency between that power and the provision contained in article 13(2). We avoid that in keeping with the unfettered power in article 368 by reading the word "law" in article 13(2) as meaning law passed under ordinary legislative power and thus not including as amendment of the Constitution therein. The words in article 13(2) are in our opinion not specific and clear enough to take in the power of amendment under article 368 and must be confined only to the power of ordinary law making contained in articles 245, etc., and other provisions of the Constitution read with various Lists. We have, therefore, no hesitation in agreeing with the view taken in *Shankari Prasad's case*, 1952 SCR 89: (AIR 1951 SC 458) which was upheld by the majority in *Sajjan Singh's case*, 1965-1 SCR 933: (AIR 1965 SC 845).

(104) The next argument is that action under the proviso to article 368 is necessary as the Seventeenth Amendment affects the power of the High Court contained in article 226. It is said that by including various Acts in Ninth Schedule and making them immune from challenge under the provisions contained in Part III, the power of the High Court under article 226 is affected in as much as the High Court cannot strike down any of the Acts included in the Ninth Schedule on the ground that they take away or abridge the rights conferred by Part III. So it is said that there has been a change in article 226 and it was necessary that the Seventeenth Amendment should have been ratified by more than half the States under the proviso. A similar argument was raised in *Shankari Prasad's case*, 1952 SCR 89: (AIR 1951 SC 458) and was turned down unanimously. The same argument was again raised in *Sajjan Singh's case*, 1965-1 SCR 933: (AIR 1965 SC 845) and was also turned down. Now ratification is required under the proviso if the amendment seeks to make any change in various provisions mentioned therein and one such provision is article

226. The question therefore is whether the Seventeenth Amendment makes any change in article 226 and whether this change has to be a direct change in the words of article 226 or whether merely because there may be some effect by the Seventeenth Amendment on the content of the power in article 226 it will amount to change in article 226. We are of opinion that when the proviso lays down that there must be ratification when there is any change in the entrenched provisions, including article 226, it means that there must be actual change in the terms of the provision concerned. If there is no actual change directly in the entrenched provision, no ratification is required, even if any amendment of any other provision of the Constitution may have some effect indirectly on the entrenched provisions mentioned in the proviso. But it is urged that there may be such a change in some other provision as would seriously affect an entrenched provision, and in such a case ratification should be necessary. This argument was also dealt with in the majority judgment in *Sajjan Singh's case*, 1965-1 SCR 933: (AIR 1965 SC 845) where the doctrine of pith and substance was applied and it was held, that where the amendment in any other article so affects the entrenched article as to amount to an amendment therein, then ratification may be necessary, even though the entrenched article may not be directly touched. Perhaps the use of the doctrine of pith and substance in such a case is not quite apt. But what was meant in *Sajjan Singh's case*, 1965-1 SCR 933: (AIR 1965 SC 845) was that if there is such an amendment of an unentrenched article that it will directly affect an entrenched article and necessitate a change therein, then recourse must be had to ratification under the proviso. We may illustrate this by two examples. Article 226 lays down *inter alia* that the High Court shall have power to issue writs for the enforcement of any of the rights conferred by Part III and for any other purpose. Now assume that Part III is completely deleted by amendment of the Constitution. If that takes place, it will necessitate an amendment of article 226 also and deletion therefrom of the words, "for the enforcement of any of the rights conferred by Part III." We have no doubt that if such a contingency ever happens and Part III is completely deleted, Parliament will amend article 226 also and that will necessitate ratification under the proviso. But suppose Parliament merely deletes Part III and does not make the necessary consequential amendment in article 226, it can then be said that deletion of Part III necessitates change in article 226 also, and, therefore, in such a case ratification is necessary even though Parliament may not have in fact provided for amendment of article 226.

(105) Take another example article 54 is an entrenched article provides for the election of the President. So is article 55 which provides for the manner of election. Article 52 which lays down that there shall

be a President is on the other hand not an entrenched article. It is said that article 52 may be altered and something else may be substituted in its place and that would not require ratification in terms as article 52 is not among the entrenched articles. But we are of opinion that if Parliament amends article 52, it is bound to make consequential amendments in article 54 and 55 which deal with the election of the President and the manner thereof and if it is so the entire amendment must be submitted for ratification. But suppose Parliament merely amends article 52 and makes no change in articles 54 and 55 (a supposition which is impossible to visualise). In that case it would in our opinion be right to hold article 52 could not be altered by abolition of the office of the President without necessitating a change in articles 54 and 55 and in such a case if article 52 alone is altered by Parliament, to abolish the office of President, it will require ratification.

(106) These two examples will show where alteration or deletion of an unentrenched article would necessitate amendment of an entrenched article, and in such a case if Parliament takes the incredible course of amending only the unentrenched article and not amending the entrenched article, Courts can say that ratification is necessary even for amending the unentrenched article, for it directly necessitates a change in an entrenched article. But short of that we are of opinion that merely because there is some effect indirectly on an entrenched article by amendment of an unentrenched article it is not necessary that there should be ratification in such circumstances also.

(107) Besides, let us consider what would happen if the argument on behalf of the petitioners is accepted that ratification is necessary whenever there is even indirect effect on an entrenched article by amending an unentrenched article. Take the case of article 226 itself. It gives power to the High Court not only to issue writs for the enforcement of fundamental rights but to issue them for any other purpose. Writs have thus been issued by High Courts for enforcing other rights conferred by ordinary laws as well as under other provisions of the Constitution, like articles 301 and 311. On this argument if any change is made in article 301 and 311 there is bound to be an effect on article 226 and, therefore, ratification would be necessary, even though both articles 301 and 311 are not entrenched in the proviso. Further, take an ordinary law which confers certain rights and it is amended and those rights are taken away. Article 226 would be clearly affected. Before the amendment of those rights may be enforced through article 226 while after the amendment the rights having disappeared there can be no enforcement thereof. Therefore, on this argument even if there is amendment of ordinary law there would be an effect on article 226 and it must, therefore, be amended every time even when ordinary law is changed and the entire procedure

under article 368 must be gone through including ratification under the proviso. It is, however, said that when ordinary law is amended, rights disappear and, therefore, there is no question of enforcement, thereof; if that is correct with respect to ordinary law, it is in our opinion equally correct with respect to the amendment of an unentrenched provision of the Constitution. The answer given in *Shankari Prasad's case*, 1952 SCR 89: (AIR 1951 SC 458) to this argument was that article 226 remained just the same as it was before, and only a certain class of cases had been excluded from the purview of Part III and the courts could no longer interfere, not because their powers were curtailed in any manner or to any extent, but because there would be no occasion thereafter for the exercise of their power in such case. We respectfully agree with these observations and are of opinion that merely because there is some indirect effect on article 226 it was not necessary that the Seventeenth Amendment should have been ratified by more than one half of the States. It is only in the extreme case, the example of which we have given above, that an amendment of an unentrenched article without amendment of entrenched article might be bad for want of ratification and this is what was intended by the majority judgment in *Sajjan Singh's case*, 1965-1 SCR 933: (AIR 1965 SC 845) when it applied the doctrine of pith and substance in these circumstances. The argument that ratification is necessary as article 226 is indirectly affected, has, therefore, no force and must be rejected. This is equally true with respect to the power of this Court under articles 132 and 136.

(108) Then it is urged that article 245 is enlarged by the Seventeenth Amendment in as much as State Legislature and Parliament were freed from the control of Part III in the matter of certain laws affecting, for example, ryotwari lands, and, therefore, as article 245 is an entrenched article there should have been ratification under the proviso. This argument in our opinion is of the same type as the argument with respect to the effect on article 226 and our answer is the same, namely, that there is no direct effect on article 245 by the amendment and the indirect effect, if any, does not require that there should have been ratification in the present case.

(109) It is then urged that ratification is necessary as article 31-B deals with State Legislation and in any case Parliament cannot make any law with respect to Acts which were put in the Ninth Schedule and, therefore, Parliament could not amend the Constitution in the manner in which it was done by making additions in the Ninth Schedule, both for want of ratification and for want of legislative competence. The answer to this argument was given in *Shankari Prasad's case*, 1952 SCR 89: (AIR 1951 SC 458) and it was observed there that—

"Article 31-A and 31-B really seek to save a certain class of laws and certain specified laws already passed from the combined operation of article 13 read with other relevant articles of Part III. The new articles being thus essentially amendments of the Constitution, Parliament had the power of enacting them. That law thus saved relate to matters covered by List II does not in any way affect the position. It was said that Parliament could not validate a law which it had no power to enact. The proposition holds good where the validity of the impugned provision turns on whether the subject matter falls within or without the jurisdiction of the legislature which passed it. But to make a law which contravenes the Constitution, constitutionally valid is a matter of constitutional amendment, and as such it falls within the exclusive power of Parliament."

We respectfully agree with these observations. They succinctly put the legal and constitutional position with respect to the validity of articles 31-A and 31-B. It seems to us that article 31-B in particular is a legislative drafting device which compendiously puts in one place amendments which would otherwise have been added to the Constitution under various articles in Part III. The laws in the Ninth Schedule have by the device of article 31-B been excepted from the various provisions in Part III, which affected them and this exception could only be made by Parliament. The infirmity in the Acts put in the Ninth Schedule was apprehended to be a constitutional infirmity on the ground that those laws might take away or abridge rights conferred by Part III. Such a constitutional infirmity could not be cured by State legislatures in any way and could only be cured by Parliament by constitutional amendment. What Parliament in fact did by including various Acts in the Ninth Schedule read with article 31-B was to amend the various provisions in Part III, which affected these Acts by making them an exception to those provisions in Part III. This could only be done by Parliament under the constituent power it had under article 368 and there was no question of the application of the provision in such a case, for Parliament was amending Part III only with respect of these laws. The laws had already been passed by State legislatures and it was their constitutional infirmity, if any, which was being cured by the device adopted in article 31-B read with the Ninth Schedule, the amendment being only of the relevant provisions of Part III which was compendiously put in one place in article 31-B. Parliament could alone do it under article 368 and there was no necessity for any ratification under the proviso, for amendment of Part III is not entrenched in the proviso.

(110) Nor is there any force in the argument that Parliament could not validate those laws by curing the constitutional infirmity because they dealt with land which is in List II of the Seventh Schedule



to the constitution over which State legislatures have exclusive legislative power. The laws had already been passed by State legislatures under their exclusive power; what had been done by the Seventeenth Amendment is to cure the constitutional infirmity, if any, in these laws in relation to Part III. That could only be done by Parliament and in so doing Parliament was not encroaching on the exclusive legislative power of the State. The States had already passed the laws and all that was done by the Seventeenth Amendment was to cure any constitutional infirmity in the laws by including them in the Ninth Schedule read with article 31-B. We must, therefore, reject the argument that the Seventeenth Amendment required ratification because laws put in the Ninth Schedule were state laws. We must equally reject the argument that as these laws dealt land, which is in the exclusive legislative power of State legislature, Parliament could not cure the constitutional infirmity if any, in these laws by putting them in the Ninth Schedule.

(111) We now come to what may be called the argument of fear. It is urged that if article 368 confers complete power to amend each and every provision of the Constitution as we have held that it does frightful consequences will follow on such an interpretation. If Parliament is clothed with such a power to amend the Constitution it may proceed to do away with fundamental rights altogether, it may abolish elected legislatures, it may change the present form of Government, it may do away with the federal structure and create a unitary state instead, and so on. It is, therefore, argued that we should give a limited interpretation to the power of amendment contained in article 368, as otherwise we shall be giving power to Parliament to destroy the Constitution itself.

(112) This argument is really a political argument and cannot be taken into account in interpreting article 368 when its meaning to our mind is clear. But as the argument was urged with a good deal of force on behalf of the petitioners and was met with equal force on behalf of the Union and the States, we propose to deal with it briefly. Now if this argument means that Parliament may abuse its power of amendment conferred by article 368, all that need be said in reply is that mere possibility of abuse cannot result in courts withholding the power if the Constitution grants it. It is well settled so far as ordinary laws are concerned that mere possibility of abuse will not induce courts to hold that the power is not there, if the law is valid and its terms clearly confer the power. The same principle in our opinion applies to the Constitution. If the Constitution gives a certain power and its terms are clear, there is no reason why that power should be withheld simply because of possibility of abuse. If we may say so, possibility of abuse of any power granted to any authority is always there; and if possibility of abuse is a reason for withholding the power, no power whatever can ever be conferred on any

authority, be it executive, legislative or even judicial. Therefore, the so-called fear of frightful consequences which has been urged on behalf of the petitioners (if we hold, as we do, that the power to amend the Constitution is unfettered by any implied limitation), is no ground for withholding the power, for we have no reason to suppose that Parliament on whom such power is conferred will abuse it. Further, even if it abuses the power of constitutional amendment under article 368 the check in such circumstances is not in courts but is in the people who elect members of Parliament. The argument for giving a limited meaning to article 368 because of possibility of abuse must therefore be rejected.

(113) The other aspect of this argument of fear is that we should not make the Constitution so flexible so that it may be open to the requisite majority with the requisite ratification to make changes too frequently in the Constitution. It is said that the Constitution is an organic document for the governance of the country and it is expected to endure and give stability to the institutions which it provides. That is undoubtedly so and this is very true of a written federal constitution. But a perusal of various Constitutions of the world shows that there are usually provisions for amendment of the Constitution in the Constitution itself. This power to amend a Constitution may be rigid or flexible in varying degrees. Jurists have felt that where the power to amend the Constitution is made too rigid and the people outgrow a particular Constitution and feel that it should be amended but cannot do so because of the rigidity of the Constitutions, they break the Constitution, and this breaking is more often than not by violent revolution. It is admitted by even those writers on the United States Constitution who were of the view that there are certain basic features, which cannot be amended and who would thus make the U.S. Constitution even more rigid than it is, that howsoever rigid the Constitution may be its rigidity will not stop the people from breaking it if they have outgrown it and this breaking is, generally speaking, by violent revolution. So, making out Constitution rigid by putting the interpretation which the petitioners want us to put on it will not stop the frightfulness which is conjured up before us on behalf of the petitioners. If anything, an interpretation which will make our Constitution rigid in the manner in which the petitioners want the amending power in article 368 to be interpreted will make a violent revolution, followed by frightfulness of which the petitioners are afraid, a nearer possibility than an interpretation which will make it flexible.

(114) It is clear that our Constitution-makers wanted to avoid making the Constitution too rigid. It is equally clear that they did not want to make an amendment of the Constitution too easy. They preferred an intermediate course which would make the Constitution flexible

and would still not allow it to be amended too easily. That is why article 368 provides for special majorities of the two Houses for the purpose of amendment of the Constitution. Besides it also provides for ratification by more than half the States in case of entrenched provisions in the proviso. Subject to these limitations, the Constitution has been made moderately flexible to allow any change when the people feel that change is necessary. The necessity for special majorities in each House separately and the necessity for ratification by more than half the States in certain cases appear to us to be sufficient safeguards to prevent too easy change in the Constitution without making it too rigid. But it is said that in the last sixteen years, a large number of amendments have been made to the Constitution and that shows that the power to amend is much too easy and should be restricted by judicial interpretation. Now judicial interpretation cannot restrict the power on the basis of a political argument. It has to interpret the Constitution as it finds it on the basis of well known canons of construction and on the terms of article 368 in particular. If on those terms it is clear as we think it is that power to amend is subject to no limitations except those to be expressly found in the Constitution, courts must give effect to that. The fact that in the last sixteen years a large number of amendments could be made and have been made is in our opinion due to the accident that one party has been returned by elections in sufficient strength to be able to command the special majorities which are required under article 368, not only at the centre but also in all the States. It is because of this circumstance that we have had so many amendments in the course of the last sixteen years. But that in our opinion is no ground for limiting the clear words of article 368.

(115) The power of amendment contained in a written federal Constitution is a safety valve which to a large extent provides for stable growth and makes violent revolution more or less unnecessary. It has been said by text book writers that the power of amendment, though it allows for change, also makes a constitution long lived and stable and serves the needs of the people from time to time. If this power to amend is made too rigid it loses its value as a safety valve. The more rigid a Constitution the more likely it is that people will outgrow it and throw it over-board violently. On the other hand, if the constitution is flexible "though it may not be made too easy to modify it" the power of amendment provides for stability of the Constitution itself and for ordered progress of the nation. If, therefore, there had to be choice between giving an interpretation to article 368 which would make our Constitution rigid and giving an interpretation which would make it flexible, we would prefer to make it flexible, so that it may endure for a long period of time and may, if necessary, be amended from time to time in accordance with the progress in the ideas of the people for whom it is meant.

But we feel that it is not necessary to go to this extent, for that would be entering into the field of politics. As we see the terms of article 368, we are clearly of opinion that the Constitution-makers wanted to make our Constitution reasonably flexible and that the interpretation that we have given to article 368 is in consonance with the terms thereof and the intention of those who made it. We therefore reject the argument of fear altogether.

(116) This brings us to the argument of *stare decisis* raised on behalf of the Union of India and the States. The argument is put thus. After the decision of the Patna High Court invalidating the Bihar Land Reforms Act, 1950, Parliament passed the First Amendment to the Constitution. That Amendment was challenged in this Court by a number of writ petitions and was upheld in *Shankari Prasad's case*, 1952 SCR 89=(AIR 1951 SC 458) in 1951. That case practically stood unchallenged till *Sajjan Singh's case*, 1965-1 SCR 933=(AIR 1965 SC 845) in 1964 after the Seventeenth Amendment was passed. Thus in the course of these fifteen years or so a large number of State Acts were passed on the basis of the First Amendment by which in particular articles 31-A and 31-B were introduced in the Constitution. It is said that though *Shankari Prasad's case*, 1952 SCR 89=(AIR 1951 SC 458) has stood for less than 15 years there have been so many laws dealing with agrarian reforms passed on the basis of the First Amendment which was upheld by this Court that the short period for which that case has stood should not stand in the way of this court acting on the principle of *stare decisis*. The reason for this is that an agrarian revolution has taken place all over the country after the First Amendment by State laws passed on the faith of the decision of this court in *Shankari Prasad's case*, 1952 SCR 89=(AIR 1951 SC 458.) This agrarian revolution has led to millions of acres of land having changed hands and millions of new titles having been created. So it is urged that the unanimous decision in *Shankari Prasad's case*, which was challenged when the Seventeenth Amendment was passed and was upheld by majority in *Sajjan Singh's case*, 1965-1 SCR 933=(AIR 1965 SC 845) should not now be disturbed as its disturbance would create chaos in the country, particularly in the agrarian sector which constitutes the vast majority of the population in this country.

(117) We are of opinion that there is force in this argument. Though the period for which *Shankari Prasad's case*, 1952 SCR 89=(AIR 1951 SC 458) has stood unchallenged is not long, the effects which have followed in the passing of State laws on the faith of that decision, are so over-whelming that we should not disturb the decision in that case. It is not disputed that millions of acres of land have changed hands and millions of new titles in agricultural lands have been created and the state

laws dealing with agricultural land which have been passed in the course of the last fifteen years after the decision in *Shankari Prasad's* case, 1952 SCR 89=(AIR 1951 SC 458) have brought about an agrarian revolution. Agricultural population constitutes a vast majority of the population in this country. In these circumstances it would in our opinion be wrong to hold now that *Shankari Prasad's* case, 1952 SCR 89=(AIR 1951 SC 458) was not correctly decided and thus disturb all that has been done during the last fifteen years and create chaos into the lives of millions of our countrymen who have benefited by these laws relating to agrarian reforms. We would in the circumstances accept the argument on behalf of the Union of India and the States that this is the fittest possible case in which the principle of *stare decisis* should be applied. On this basis also, apart from our view that *Shankari Prasad's* case, 1952 SCR 89=(AIR 1951 SC 458) was in fact rightly decided, we would not interfere with that decision now.

(118) But it is urged that instead of following the principles of *stare decisis* which would make the decision in *Shankari Prasad's* case 1952 SCR 89=(AIR 1951 SC 458) good for all times, we should follow the doctrine of prospective overruling, which has been evolved by some United States courts so that everything that has been done upto now, including the Séventeenth Amendment would be held good but in future it would not be open to Parliament to amend Part III by taking away or abridging any of the rights conferred thereby and, if the argument as to implied limitations on the power to amend is accepted, further limit the power of Parliament to amend, what may be called basic features of the Constitution. We must say that we are not prepared to accept the doctrine of prospective overruling. We do not know whether this doctrine which it is urged should be applied to constitutional amendment would also be applied to amendments of ordinary laws. We find it difficult to visualise what would be the effect of this doctrine if it is applied to amendment of ordinary laws. We have so far been following in this country the well known doctrine that courts declare law and that a declaration made by a court is the law of the land and takes effect from the date the law came into force. We would on principle be loath to change that well known doctrine and supersede it by the doctrine of prospective overruling. Further it seems to us that in view of the provisions of article 13(2) it would be impossible to apply the doctrine of the prospective overruling in our country, particularly where a law infringes fundamental rights. Article 13(2) lays down that all laws taking away or abridging fundamental rights would be void to the extent of contravention. It has been held by this Court in *Deep Chand v. The State of Uttar Pradesh*<sup>15</sup>, that a

law made after the Constitution came into force which infringes fundamental rights is a still-born law and that the prohibition contained in article 13(2) went to the root of the State power of legislation and any law made in contravention of that provision was void *ab initio*. This case has been followed in *Mahendra Lal Jaini v. The State of Uttar Pradesh*<sup>26</sup>. In the face of these decisions it is impossible to apply the principle of prospective overruling in this country so far as ordinary laws are concerned. Further, if the word "law" in article 13(2) includes an amendment of the Constitution, the same principle will apply, for that amendment would be still-born if it infringes any fundamental right contained in Part III. In these circumstances, it would be impossible to apply the principle of prospective overruling to constitutional amendments also. On the other hand, if the word "law" in article 13(2) does not include an amendment of the Constitution, then there is no necessity of applying the principle of prospective overruling for in that case unless some limitations on the power of amendment of the Constitution are implied the amendment under article 368 would not be liable to be tested under article 13(2). We are, therefore, unable to apply the doctrine of prospective overruling in the circumstances. Further as we are of opinion that this is the fittest possible case in which the principle of *stare decisis* applies, we must uphold *Shankari Prasad's* case, 1952 SCR 89; (AIR 1951 SC 458), for this reason also.

(119) Lastly we would refer to the following observations in *Sajjan Singh's* case, 1965-1 SCR 933=(AIR 1965 SC 845) [at pp. 947-48 of SCR; (at pp. 854-855 of AIR)] with respect to overruling earlier judgments of this court and specially those which are unanimous, like *Shankari Prasad's* case, 1952 SCR 89; (AIR 1951 SC 458):—

"It is true that the Constitution does not place any restriction on our powers to review our earlier decisions or even to depart from them and there can be no doubt that in matters relating to the decision of Constitutional points which have a significant impact on the fundamental rights of citizens, we would be prepared to review our earlier decisions in the interest of public good... Even so, the normal principle that judgments pronounced by this Court would be final, cannot be ignored and unless considerations of a substantial and compelling character make it necessary to do so, we should be slow to doubt the correctness of previous decisions or to depart from them.

"It is universally recognised that in regard to a large number of constitutional problems which are brought before this Court for its

26. 1963 Supp. (1) SCR 912; AIR 1963 SC 1019.

decision, complex and difficult questions arise and on many of such questions two views are possible. Therefore, if one view has been taken by this Court after mature deliberation, the fact that another Bench is inclined to take a different view may not justify the Court in reconsidering the earlier decision or in departing from it...Even so, the Court should be reluctant to accede to the suggestion that its earlier decisions should be light heartedly reviewed and departed from. In such a case the test should be, is it absolutely necessary and essential that the question already decided should be re-opened? The answer to this question would depend on the nature of the infirmity alleged in the earlier decision, its impact on the public good, and the validity and compelling character of the considerations urged in support of the contrary view. If the said decision has been followed in a large number of cases, that again is a factor which must be taken into account."

(120) A similar view was taken in *Keshav Mills Company Ltd. v. Commissioner of Income-Tax*<sup>27</sup>, where it was observed that—"...before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified." These principles were applied in *Sajjan Singh's case*, 1965-1 SCR 933= (AIR 1965 SC 845), and it was observed that if *Shankari Prasad's case*, 1952 SCR 89: (AIR 1951 SC 458), were to be overruled, "it would lead to the inevitable consequence that the amendments made in the Constitution both in 1955 and 1956 would be rendered invalid and a large number of decisions dealing with the validity of the Acts included in the Ninth Schedule which have been pronounced by different High Courts ever since the decision of this Court in *Shankari Prasad's case*, 1952 SCR 89: (AIR 1951 SC 458) was declared, would also be exposed to serious jeopardy".

(121) The majority in that case, therefore, was not in favour of reviewing *Shankari Prasad's case*, 1952 SCR 89: (AIR 1951 SC 458), even so in view of the argument raised and the importance of the question is considered the arguments against that decision and came to the conclusion itself that that case was rightly decided. We may add that besides so many cases in the High Courts there have been a large number of cases in this Court to which it is unnecessary to refer where on the faith of various amendments made in the Constitution, particularly, the First, the Fourth and the Sixteenth, amending fundamental rights, this Court

(2) to (6) allows a curtailment of rights in the public interest. This shows that Part III is not static. It visualises changes and progress but at the same time it preserves the individual rights. There is hardly any measure of reform which cannot be introduced reasonably, the guarantee of individual liberty notwithstanding. Even the agrarian reforms could have been partly carried out without articles 31-A and 31-B but they would have cost more to the public exchequer. The rights of society are made paramount and they are placed above those of the individual. This is as it should be. But restricting the Fundamental Rights by resort to clauses (2) to (6) of article 19 is one thing and removing the rights from the Constitution or debilitating them by an amendment is quite another. This is the implication of *Shankari Prasad's case*, 1952 SCR 89=(AIR 1951 SC 458). It is true that such things would never be, but one is concerned to know if such a doing would be possible."

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"The Constitution gives so many assurances in Part III that it would be difficult to think that they were the play things of a special majority. To hold this would mean *prima facie* that the most solemn parts of our Constitution stand on the same footing as any other provision and even on a less firm ground than one on which the articles mentioned in the proviso stand. The anomaly that article 226 should be somewhat protected but not article 32 must give us pause. Article 32 does not erect a shield against private conduct but against state conduct including the legislatures (See article 12). Can the legislature take away this shield? Perhaps by adopting a liberal construction of article 368 one can say that. But I am not inclined to play a grammarian's role. As at present advised I can only say that the power to make amendments ought not ordinarily to be a means of escape from absolute constitutional restrictions."

(127) My opposition (lest one misunderstands its veridical character) appears to be cautious and even timid but this was because it was attended by an uneasy feeling that I might have missed some immanent truth beyond what was said in *Shankari Prasad's case*, 1952 SCR 89=(AIR 1951 SC 458). The arguments then were extremely brief. After hearing full arguments in this case, which have not added to the reasoning of the earlier cases, I am not satisfied that the reasons are cogent enough for me to accept them. I say it with respect that I felt then, as I do so even more strongly now, that in the two earlier cases, the result was reached



by a mechanical jurisprudence in which harmonious construction was taken to mean that unless article 368 itself made an exception the existence of any other provision indicative of an implied limitation on the amending power, could not be considered. This was really to refuse to consider any argument which did not square with the *a priori* view of the omniscience of article 368. Such reasoning appears to me to be a kind of doctrinaire conceptualism based on an arid textual approach supplemented by one concept that an amendment of the Constitution is not an exercise of legislative power but of constituent power and, therefore, an amendment of the Constitution is not law at all as contemplated by article 13(2). I am reminded of the words of Justice Holmes that "we must think things and not words". The true principle is that if there are two provisions in the Constitution which seem to be hostile, juridical hermeneutics requires the Court to interpret them by combining them and not by destroying one with the aid of the other. No part in a Constitution is superior to another part unless the Constitution itself says so and there is no accession of strength to any provision by calling it a code. Portalis, the great French Jurist (who helped in the making of the Code Napoleon) supplied the correct principle when he said that it is the context of the legal provisions which serves to illustrate the meaning of the different parts, so that among them and between them there should be correspondence and harmony.

(128) 'We have two provisions to reconcile. Article 368 which says that the Constitution may be amended by following this and this procedure, and article 13(2) which says, the State shall not make any law which takes away or abridges the rights conferred by Part III and that any law made in contravention of the clause shall, to the extent of the contravention, be void. The question, therefore, is: does this create any limitation upon the amending process? On the answer to this question depends the solution of all the problems in this case.

(129) It is an error to view our Constitution as if it were a mere organisational document by which the people established the structure and the mechanism of their Government. Our Constitution is intended to be much more because it aims at being a social document in which the relationship of Society to the Individual and of Government to both and the rights of the Minorities and the Backward Classes are clearly laid down. This social document is headed by a Preamble which epitomizes the principles on which the Government is intended to function and these principles are later expanded into Fundamental Rights in Part III and the Directive Principles of Policy in Part IV. The former are protected but the latter are not. The former represent the limits of State action and the latter are the obligations and the duties of the Government as a good and social Government.

(130) Why was it necessary to have the Fundamental Rights at all and make them justiciable? As we seem to be forgetting our own history so soon let me say that the answer lies there. The Nationalist Movement and the birth of the Indian National Congress in 1885 were the direct result of the discriminatory treatment of Indians in their own country. The demand for the guarantee of Fundamental Rights had unfortunately to be made then to a foreign ruler and it appeared in the Constitution of India Bill framed by the Indian National Congress ten years later. All that is valuable to an Individual in civilized society, including free speech, imprisonment only by a competent authority, free state education, etc., were claimed therein. Resolution of the Congress since then reiterated this demand and the securing of Fundamental Rights in any future Constitution became one of the articles of faith. To cut the narration short, the main steps may only be mentioned. Mrs. Besant's Commonwealth of India Bill, 1925 with its seven fundamental rights (the precursor of article 19), the Madras Congress Resolution of 1927 "a constitution on the basis of declaration of rights", the Nehru Report—"it is obvious that our first care should be to have the Fundamental Rights guaranteed in a manner which will not permit their withdrawal in any circumstances", the draft article in the Nehru Constitution—"No person shall be deprived of his liberty, nor shall his dwelling or property be entered, requisitioned or confiscated save in accordance with law", the Independence Resolution of 26th January, 1930 "We believe that it is the inalienable right of the Indian people, as of any other people, to have freedom and to enjoy the fruits of their toil and have the necessities of life, so that they may have full opportunities of growth"—the Karachi Resolution on Fundamental Rights, Economic and Social Change (1931), the Sapru Report (1945) which for the first time distinguished between justiciable and non-justiciable rights, the suggestion of the Cabinet Mission for the constitution of an Advisory Committee on Fundamental and Minority Rights, and, lastly, the Committee on Fundamental Rights of the Constituent Assembly, are just a few of the steps to be remembered. The Fundamental Rights and the Directive Principles were the result.

(131) Fundamental laws are needed to make a Government of laws and not of men and the Directive Principles are needed to lay down the objectives of a good Government. Our Constitution was not "the cause but the result of political and personal freedom". Since Dicey had said that "the proclamation in a Constitution or Charter of the right to personal freedom, or indeed of any other right, gives of itself but slight security that the right has more than a nominal existence"<sup>29</sup>, provision had to be made guaranteeing them and to make them justiciable and

enforceable. This result is reached by means of articles 12, 13, 32, 136, 141, 144, and 226. The High Courts and finally this Court have been made the Judges of whether any legislative or executive action on the part of the State considered as comprehensively as is possible, offends the Fundamental Rights and article 13(2) declares that legislation which so offends is to be deemed to be void. It is thus that Parliament cannot today abridge or take away a single Fundamental Right even by a unanimous vote in both the Chambers. But on the argument of the State it has only to change the title of the same Act to an Amendment of the Constitution Act and then a majority of the total strength and a two-thirds majority of the members present and voting in each House may remove not only any of the Fundamental Rights but the whole Chapter giving them. And this is said to be possible because of article 368 and its general language which, it is claimed, makes no exception in its text and, therefore, no exception can be impleaded. It is obvious that if an Act amending the Constitution is treated as a law it must also be subject to the provisions of article 13(2). Since the definition of the word 'law' makes no exception, a strenuous effort is made on the basis of argument and authority to establish that a constituent power does not result in a law in the ordinary sense. Distinction is thus made between laws made ordinarily, that is to say, from day to day by ordinary majority and laws made occasionally for the amendment of the Constitution by a slightly enhanced majority. In our Constitution this distinction is not valid in the eye of article 13(2).

(132). It is not essential, of course, that a difference must always exist in the procedure for the exercise of constituent and ordinary legislative power. One has not to go far to find the example of a country in which constitutional law as such may be made by the same agency which makes ordinary laws. The most outstanding example is that of England about which De Tocqueville observed:

"the Parliament has an acknowledged right to modify the constitution as, therefore, the Constitution may undergo perpetual changes, it does not in reality exist; the Parliament is at once a legislative and a constituent assembly."<sup>30</sup>

Of course, the dictum of De Tocqueville that the English Constitution "*elle n'existe point*" (it does not exist) is far from accurate. There is a vast body of constitutional laws in England which is written and statutory but it is not all found in one place and arranged as a written

30. A. V. Dicey: *Introduction to the Study of the Law of the Constitution*, (10th Ed.) p. 88, quoting from *Oeuvres complètes* (14th Ed., 1864), Vol. I (Democratic en Amérique, pp. 166, 167)

Constitution usually is. The Act of Settlement (1701), the Act of Union with Scotland (1707), the Act of Union with Ireland (1800), the Parliament Act (1911), the Representation of the Peoples Acts of 1832, 1867, 1884, 1918, 1928 and 1948, the Ballot Act (1872), the Judiciary Acts 1873, 1875 and 1925, the Incitement to Disaffection Act (1934), His Majesty's Declaration of Abdication Act (1936), the Regency Act (1937) and the various Acts setting up different ministries are examples of what will pass for constitutional law under our system.<sup>31</sup> The Bill of Rights (1689) lays down the fundamental rule in England that taxation may not be levied without the consent of Parliament which in our Constitution has its counterpart in article 265. In our Constitution also the laws relating to delimitation of constituencies of allotment of seats to such constituencies made or purporting to be made under article 327 or article 328, by reason of the exclusion of the powers of the Courts to question them, are rendered constitutional instruments. Other examples of constitutions which, in addition to constitution proper, contain ordinary legislation having constitutional qualities, also exist.<sup>32</sup>

(133) What then is the real distinction between ordinary law and the law made in the exercise of constituent power? I would say under the scheme of Constitution none at all. This distinction has been attempted to be worked out by several authors. It is not necessary to quote them. Taking the results obtained by Willoughby<sup>33</sup>, it may be said that the fact that a Constitution is written as a Constitution, is no distinction because in Britain constitutional law is of both kinds and both parts co-exist. The test that the Constitution requires a different kind of procedure for amendment, also fails because in Britain Parliament by a simple majority makes laws and also amends constitutional statutes. In our Constitution too, in spite of the claim that article 368 is a code (whatever is meant by the word "code" here), articles 4, 11 and 169 show that the amendment of the Constitution can be by the ordinary law making procedure. By this method one of the legislative limbs in a State can be removed or created. This destroys at one stroke the claim that article 368 is a code and also that any special method of amendment of the Constitution is fundamentally necessary.

31. The list is taken from K.G. Wheare's: *The Statute of Westminster and Dominion Status*, (4th Edition) p. 8. Dicey and others give different lists.

32. The Constitutions of Austria, Honduras, Nicaragua, Peru, Spain and Sweden among others. The Constitution of Spain in particular is in several instruments. The Constitution of Austria (article 149) makes special mention of these Constitutional instruments.

33. Tagore Law Lectures, 1924, p. 83.

(134) The next test that the Courts must apply the Constitution in preference to the ordinary law may also be rejected on the analogy of the British practice. There, every statute has equal standing. Therefore, the only difference can be said to arise from the fact that constitutional laws are generally amendable under a process which in varying degrees, is more difficult or elaborate. This may give a distinct character to the law of the Constitution but it does not serve to distinguish it from the other laws of the land for purposes of article 13(2). Another difference is that in the written Constitutions the form and power of Government alone are to be found and not rules of private law as is the case with ordinary laws. But this is also not an invariable rule. The American Constitution and our Constitution itself are outstanding examples. There are certain other differences of degree, such as that ordinary legislation may be tentative or temporary, more detailed or secondary, while the Constitution is intended to be permanent, general and primary. Because it creates limitations on the ordinary legislative power, constitutional law in a sense is fundamental law, but if the legislative and constituent processes can become one, is there any reason why the result should be regarded as law in the one case and not in the other? On the whole, therefore, as observed in the American Jurisprudence:

"It should be noticed, however, that a statute and a Constitution, though of unequal dignity are both laws and each rests on the will of the people....."<sup>31</sup>

A Constitution is law which is intended to be for all time and is difficult to change so that it may not be subject to "impulses of majority", "temporary excitement and popular caprice or passion."<sup>32</sup>

(135) I agree with the authors cited before us that the power of amendment must be possessed by the State. I do not take a narrow view of the word "amendment" as including only minor changes within the general framework. By an amendment new matter may be added, old matter removed or altered, I also concede that the reason for the amendment of the Constitution is a political matter although I do not go as far as some Justices of the Supreme Court of the United States did in *Coleman v. Miller* [(1938) 307 US 433-83 Law Ed 1335], that the whole process is "political in its entirety from submission until an amendment becomes part of the Constitution and is not subject to judicial guidance, control or interference at any point".

31. *American Jurisprudence*, Vol. II, Section 3.

32. Amendment is expressly called a legislative process in the Constitutions of Colombia, Costa Rica, Hungary, Panama and Peru. In Portugal the ordinary legislatures enjoy constituent powers every 10 years.

There are fundamental differences between our Constitution and the Constitution of the United States of America. Indeed this dictum of the four Justices based upon the case of *Luther v. Borden* [(1817-50) 7 How 1=12 Law Ed 581]], has lost some of its force after *Baker v. Carr* [(1962) 369 US 186=(7L Ed 2nd 633)].

(136) A Republic must, as says Story,<sup>36</sup> possess the means for altering and improving the fabric of the Government so as to promote the happiness and safety of the people. The power is also needed to disarm opposition and prevent factions over the Constitution. The power, however, is not intended to be used for experiments or as an escape from restrictions against undue state action enacted in the Constitution itself. Nor is the power of amendment available for the purpose of removing express or implied restrictions against the State.

(137) Here I make a difference between Government and State which I shall explain presently. As Willoughby<sup>37</sup> points out constitutional law ordinarily limits Government but not the State because a constitutional law is the creation of the State for its own purpose. But there is nothing to prevent the State from limiting itself. The rights and duties of the individual and the manner in which such rights are to be exercised and enforced are ordinarily to be found in the laws though some of the Constitutions also fix them. It is now customary to have such rights guaranteed in the Constitution. Peaslee<sup>38</sup>, writing in 1956 says that about 88% of the national Constitutions contain clauses respecting individual liberty and fair legal process; 83% respecting freedom of speech and the press; 82% respecting property right; 80% respecting rights of assembly and association; 80% respecting rights of conscience and religion; 79% respecting secrecy of correspondence and inviolability of domicile; 78% respecting education; 73% respecting equality; 64% respecting right to petition; 56% respecting labour; 51% respecting social security; 47½% respecting rights of movement within, and to and from the nation; 47% respecting health and motherhood; and 35% respecting the non-retroactivity of laws. In some of the Constitutions there is an attempt to put a restriction against the State seeking to whittle down the rights conferred on the individuals. Our Constitution is the most outstanding example of this restriction which is to be found in article 13(2). The State is no doubt legally supreme but in the supremacy of its powers it may create impediments on its own sovereignty. Government is always bound by the restrictions created in favour

36. *Commentaries on the Constitution of the United States* (1833), Vol. III, pp. 686-687.

37. *Op. cit. Sup.*, p. 84.

38. *Constitutions of Nations*, Vol. I (2nd Ed.), p. 7.

of Fundamental Rights but the State may or may not be. Amendment may be open to the State according to the procedures laid down by the Constitution. There is nothing, however, to prevent the State from placing certain matters outside the amending procedure.<sup>39</sup> Examples of this exist in several Constitutions of the world; see article 5 of the American Constitution; article 95 of the Constitution of France; article 95 of the Constitution of Finland; article 97 of the Constitution of Cambodia; article 183 of the Constitution of Greece; article 97 of the Japanese Constitution; article 139 of the Italian Constitution, to mention only a few.

(138) When this happens the ordinary procedure of amendment ceases to apply. The unlimited competence (the *kompetenz-kompetenz* of the Germans) does not flow from the amendatory process. Amendment can then be by a fresh constituent body. To attempt to do this otherwise is to attempt a revolution. I do not know why the word "revolution", which I have used before, should evoke in some persons an image of violence and subversion. The whole American Constitution was the result of a bloodless revolution and in a sense so was ours. The adoption of the whole Constitution and the adoption of an amendment to the Constitution have much in common. An amendment of the Constitution has been aptly called a Constitution in little and the same question arises whether it is by a legal process or by revolution. There is no third alternative. An amendment, which repeals the earlier Constitution, unless legal, is achieved by revolution. As stated in the *American Jurisprudence*

"An attempt by the majority to change the fundamental law in violation of self-imposed restrictions is unconstitutional and revolutionary."<sup>40</sup>

There are illegal and violent revolutions and illegal and peaceful revolutions. Modification of Constitution can only be by the operation of a certain number of wills acting on other wills. The pressure runs through a broad spectrum, harsh at one end, gentle at the other. But whatever the pressure may be, kind or cruel, the revolution is always there if the change is not legal. The difference is one of method, not of kind. Political thinking starts from the few at the top and works downward more often than in the reverse direction. It is wrong to think that masses alone, called "the

39. In the Constitution of Honduras, partial amendment only is possible. For a complete amendment a Constituent Assembly has to be convoked. In the Constitution of Brazil, the Constitution cannot be amended when there is a state of seige (our emergency). In Turkey an amendment of article I, cannot even be proposed.

40. Vol. II, Section 25, pp. 629-630.





The State is the sum total of all the agencies which are also individually mentioned in article 12 and by the definition all the parts severally are also included in the prohibition. Now see how 'Law' is defined:

"13. \* \* \* \*

(3) In this article unless the context otherwise requires,

(a) 'Law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law."

(140) In *Sajjan Singh's* case, 1965-1 SCR 933=(AIR 1965 SC 845) I said that if amendments of the Constitution were meant to be excluded from the word 'Law' it was the easiest thing to add to the definition the further words "but shall not include an amendment of the Constitution". It is argued now before us that this was not necessary because article 368 does not make any exception. This argument came at all stages like a refrain and is the real cause of the obfuscation in the opposite view. Those who entertain this thought do not pause to consider: why make a prohibition against *the State*? As Cooley said:

"there never was a republican Constitution which delegated to functionaries all the latent powers which lie dormant in every nation and are boundless in extent and incapable of definition."

If the State wields more power than the functionaries there must be a difference between the State and its agencies such as Government, Parliament, the Legislatures of the States and the local and other authorities. Obviously, the State means more than any of these or all of them put together. By making the State subject to Fundamental Rights it is clearly stated in article 13(2) that any of the agencies acting alone or all the agencies acting together are not above the Fundamental Rights. Therefore, when the House of the People or the Council of States introduces a Bill for the abridgement of the Fundamental Rights, it ignores the injunction against it and even if the two Houses pass the Bill the injunction is next operative against the President since the expression "Government of India" in the General Clauses Act means the President of India. This is equally true of ordinary laws and laws seeking to amend the Constitution. The meaning of the word "State" will become clear if I draw attention at this stage to article 325 of the Constitution of Nicaragua, which reads as follows:—

"325. The agencies of the Government, jointly or separately, are forbidden to suspend the Constitution or to restrict the rights granted by it, except in the cases provided therein."

In our Constitution the agencies of the State are controlled jointly and separately and the prohibition is against the whole force of the State acting

either in its executive or legislative capacity. The control of the Executive is more important than even the Legislature. In modern politics run on parliamentary democracy the Cabinet attains a position of dominance over the Legislature. The Executive, therefore, can use the Legislature as a means of securing changes in the laws which it desires. It happened in Germany under Hitler. The fact has been noticed by numerous writers, for example, Wade and Philip<sup>42</sup>, Sir Ivor Jennings<sup>43</sup>, Dawson<sup>44</sup>, Keith<sup>45</sup> and Ramsay Muir<sup>46</sup>. Dawson in particular said that a Cabinet is no longer responsible to the Commons but the Commons has become instead responsible to the Government. Ivor Jennings added that if a Government had majority it could always secure the legislation. The others pointed out that the position of the Cabinet towards Parliament tends to assume more or less dictatorial powers and that was why people blamed Government, that is to say, the Cabinet rather than Parliament for ineffective and harsh laws.

(141) This is true of our country also regarding administration and legislation. Fortunately, this is avoided at least in so far as the Fundamental Rights are concerned. Absolute, arbitrary power in defiance of Fundamental Rights exist nowhere under our Constitution, not even in the largest majority. The peoples' representatives have, of course, inalienable and undisputable right to alter, reform or abolish the Government in any manner they think fit, but the declarations of the Fundamental Rights of the citizens are]the inalienable rights of the people. The extent of the power of the rulers at any time is measured by the Fundamental Rights. It is wrong to think of them, as rights within the Parliament's giving or taking. Our Constitution enables an individual to oppose successfully the whole community and the State and claim his rights. This is because the Fundamental Rights are so safeguarded that within the limits set by the Constitution they are inviolate. The Constitution has itself said what protection has been created round the person and property of the citizens and to what extent this protection may give way to the general good. It is wrong to invoke the Directive Principles as if there is some antinomy between them and the Fundamental Rights. The Directive Principles lay down the routes of State action but such action must avoid the restrictions stated in the Fundamental Rights. Prof. Anderson<sup>47</sup> taking the constitutional amendments, as they have been in our country, considered the Directive Principles to be more potent than

42. *Constitutional Law* (6th Ed.), p. 27.

43. *Parliament* (1957), pp 11-12.

44. *Government of Canada* (1952), Chapter XIX.

45. *An Introduction to the British Constitutional Law* (1931), p. 49.

46. *How Britain is Governed*, pp. 5, 6.

47. *Changing Law in Developing Countries*, pp. 88-89.

the Fundamental Rights. That they are not, is clear when one takes the Fundamental Rights with the guaranteed remedies. The Directive Principles are not justiciable but the Fundamental Rights are made justiciable. This gives a judicial control and check over State action even within the four corners of the Directive Principles. It cannot be conceived that in following the Directive Principles the Fundamental Rights (say for example the equality clause) can be ignored. If it is attempted, then the action is capable of being struck down. In the same way, if an amendment of the Constitution is law, for the reasons explained by me, such an amendment is also open to challenge under article 32, if it offends against the Fundamental Rights by abridging or taking them away. Of course, it is always open to better Fundamental Rights. A law or amendment of the Constitution would offend the Fundamental Rights only when it attempts to abridge or take them away.

(142) The importance of Fundamental Rights in the world of today cannot be lost sight of. On December 10, 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights without a dissent. This draft was made after the Third Committee of the United Nations had devoted 85 meetings to it. The Declaration represents the civil, political and religious liberties for which men have struggled through the centuries and those new social and economic rights of the Individual which the Nations are increasingly recognising in their Constitutions. Some of these were proclaimed during the French Revolution and are included in the declarations of Nations taking pride in the dignity and liberty of the Individual. They are epitomized in the Preamble, and more fully expressed in Part III and IV of our Constitution. These Declarations wherever found are intended to give a key to social progress by envisaging rights to work, to education and to social insurance.

(143) The Nations of the world are now in the Second stage, where Covenants are being signed on the part of the States to respect such rights. United Nations Human Rights Commission has worked to produce two drafts—one dealing with civil and political rights and the other with economic, social and cultural rights. The third stage is still in its infancy in which it is hoped to provide for the enforcement of these rights on an international basis. The Regional Charter of the Human Rights under which there is established already a European Commission of Human Rights to investigate and report on violations of Human Rights, is a significant step in that direction. After 1955 the European Commission has become competent to receive complaints from individuals although the enforceability of Human Rights on an international basis is still far from being achieved. If one compares the Universal Declaration with Parts

III and IV of our Constitution one finds remarkable similarity in the two. It is significant that our *Committee on Fundamental Rights* was deliberating when the Third Committee of the United Nations was deliberating on the *Universal Declaration of Human Rights*. Both are manifestoes of man's inviolable and fundamental freedoms.

(144) While the world is anxious to secure Fundamental Rights internationally, it is a little surprising that some intellectuals in our country, whom we may call "*classe non classe*" after Hegel, think of the Directive Principles in our Constitution as if they were superior to Fundamental Rights. As a modern philosopher<sup>48</sup> said such people 'do lip service' to freedom, thinking all the time in terms of social justice "with 'freedom' as a by-product." Therefore, in their scheme of things Fundamental Rights become only an *epitheton ornans*. One does not know what they believe in the communistic millenium of Marx or the individualistic Utopia of Bastiat. To them an amendment of the Fundamental Rights is permissible if it can be said to be within a scheme of a supposed socio-economic reform, however, much the danger to liberty, dignity and freedom of the individual. There are others who hold to liberty and freedom of the individual under all conditions. Compare the attitude of Middleton Murray who would have Communism provided "there was universal freedom of speech, of association, of elections and of Parliament". To such the liberty and dignity of the Individual are inviolable. Of course, the liberty of the individual under our Constitution, though meant to be fundamental, is subject to such restrictions as the needs of society dictate. These are expressly mentioned in the Constitution itself in the hope that no further limitations would require to be imposed at any time.

(145) I do not for a moment suggest that the question about reasonableness, expediency or desirability of the amendments of the Constitution from a political angle is to be considered by the courts. But what I do say is that the possession of the necessary majority does not put any party above the constitutional limitations implicit in the Constitution. It is obvious that the Constituent Assembly in making the Fundamental Rights justiciable was not satisfied with reliance on the sense of self-restraint or public opinion<sup>49</sup> on which the majority in *Sajjan Singh's* case, 1965-1 SCR 933=(AIR 1965 SC 845) does. This is not an argument of fear. The question to ask is: can a party, which enjoys 2/3rds majority today, before it loses it, amend article 368 in such wise that a simple majority would be sufficient for the future amendments of the Constitu-

48. Benedetto Croce.

49. Sir Robert Peel calls it "that great compound of folly, weakness, prejudice, wrong feeling, right feeling, obstinacy and newspaper propaganda".

tion? Suppose it did so, would there be any difference between the constitutional and the ordinary laws made thereafter?

(146) The liberty of the Individual has to be fundamental and it has been so declared by the people. Parliament today is not the *constituent body* as the Constituent Assembly was, but is a *constituted body* which must bear true allegiance to the Constitution as by law established. To change the Fundamental part of the Individual's liberty is a usurpation of constituent functions because they have been placed outside the scope of the power of constituted Parliament. It is obvious that Parliament need not now legislate at all. It has spread the umbrella of article 31-B and has only to add a clause that all legislation involving Fundamental Rights would be deemed to be within the protection hereafter. Thus the only palladium against legislative dictatorship may be removed by a 2/3rds majority not only in *praesenti* but *defuturo*. This can hardly be open to a constituted Parliament.

(147) Having established that there is no difference between the ordinary legislative and the amending processes in so far as clause (2) of article 13 is concerned, because both being laws in their true character, come within the prohibition created by that clause against the State and that the Directive Principles cannot be invoked to destroy Fundamental Rights I proceed now to examine whether the *English and American* precedents lay down any principle applicable to amendments of our Constitution. In Britain the question whether a constitutional amendment is *valid or not* cannot arise because the courts are powerless. Parliamentary Sovereignty under the English Constitution means that Parliament enjoys the right to make or unmake any law whatever and no person or body has any right to question the legislation. The utmost and absolute despotic power belongs to Parliament. It can "make, confirm, enlarge, restrain, abrogate, repeal, revise and expand law concerning matters of all possible denominations". What Parliament does, no authority on earth can undo. The Queen, each House of Parliament, the constituencies and the Law Courts have in the past claimed independent legislative powers but these claims are unfounded. It is impossible to compare the Indian Parliament with the British Parliament as the former concededly in the ordinary legislation, is subject to judicial review, both on the ground of competence arising from a federal structure and the existence of Fundamental Rights. The question of competence in the matter of amendment of the Constitution depends upon, firstly, compliance with the procedure laid down in article 368 and, secondly, upon the question whether the process is in any manner restricted by the

Fundamental Rights. Such questions cannot obviously arise in the British Parliament.<sup>50</sup>

(148) The example of the Constitution of the United States cannot also serve any purpose although the greatest amount of support was sought to be derived from the decisions of the Supreme Court and the institutional writings in the United States. The power of amendment in the United States Constitution flows from article V.<sup>51</sup> It must be noticed that the power is clearly not made equal to ordinary legislative process. One salient point of difference is that the President is nowhere in this scheme because his negative does not run.<sup>51a</sup> The amendment is thus not of the same quality as ordinary legislation.

(149) The Supreme Court of the United States has no doubt brushed aside objections to amendments of the Constitution on the score of incompetence, but has refrained from giving any reasons. In the most important of them, which questioned the 18th Amendment, the Court only stated its conclusions. After recalling the texts of the article under which Amendments may be made and of the 18th Amendment proposed by the Congress in 1917 and proclaimed as ratified by the States in 1919, the court announced:

"4. The prohibition of the manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes, as embodied in the 18th Amendment, is within the power to amend reserved by article 5 of the Constitution." (emphasis (here ' ') supplied)<sup>51b</sup>

50. Dicey gives three supposed limitations on the power of Parliament. Of these one that language has been used in Acts of Parliament which implies that one Parliament can make laws which cannot be touched by any subsequent Parliament, is not true. The best examples are Act of treaties with Scotland and Ireland but these same Acts have been amended later. Francis Bacon found this claim to be untenable. See Dicey: *The Law of the Constitution*, pp. 64-65.

51. "Article V. The Congress, whenever 2/3rds of both Houses shall deem it necessary shall propose Amendment to this Constitution, or on the Application of the Legislature of two-thirds of the several States, shall call a Convention for proposing Amendment, which, in either case, shall be valid to all intents and purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the Year 1808 shall in any manner effect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal suffrage in the Senate.

51a. See *Hollingsworth v. Virginia* (1797) 3 Dall 378.

51b. See *National Prohibition Cases* (1919) 253 US 350.

from its record and it was denied. The Supreme Court of Kansas refused to review this denial on *Certiorari*. The Supreme Court of the United States in an opinion, in which not more than 4 Justices took any particular view, declined to interfere. Majority affirmed the decision of Supreme Court of Kansas. Four Justices considered that the question was political from start to finish and three Justices that the previous rejection of the law and the extraordinary time taken to ratify were political questions.

(153) Although the Supreme Court has scrupulously refrained from passing on the ambit of article V it has nowhere said that it will not take jurisdiction in any case involving the amending process<sup>52</sup>. In *Hollingsworth v. Virginia* (1797) 3 Dall 378 (*Op. cit. supra*) the Supreme Court assumed that the question was legal. The Attorney General did not even raise an objection. In *Luther v. Borden* (1847-50) 7 How 1 (*Op. cit. supra*), the matter was finally held to be political which opinion prevailed unimpaired till some doubts have arisen after *Baker v. Carr* (1962) 369 US 186 (*Op. cit. supra*). In the case the Court remarked...

"We conclude...that the non-justiciability of claims resting on the guarantee clause which arises from the embodiment of questions that were thought 'political' can have no bearing upon the justiciability of the equal protection claim presented in this case...We emphasize that it is the involvement in guarantee clause claims of the elements thought to define 'political questions' and no other feature, which could render them non-justiciable. Specifically, we have said that such claims are not held non-justiciable because they touch matters of State Governmental Organisation."

It would appear that the Equal Protection Clause was held to supply a guide for examination of apportionment methods better than the Guarantee Clause.

(154) Although there is no clear pronouncement, a great controversy exists whether questions of substance can ever come before the Court and whether there are any implied limitations upon the amendatory power. In the cases above noted, the other articles (particularly the Bill of Rights) were not read as limitations and no limitations outside the amending clause was implied. In the two cases in which the express limitation of Equal Suffrage Clause was involved the Court did not enter the question. Thus the 15th and, on its strength, the 19th Amendments

52. See Rottschaeffer: *Handbook of American Constitutional Law* (1939), pp. 397 and 398; though the author's opinion is that it will deny jurisdiction.

were upheld. In *Goleman v. Miller* (*Op. cit. supra*) the political question doctrine brought the support of only four Justices and in *Baker v. Carr*, (1962) 369 US 186, *Op. cit. supra* the Federal Courts were held to have jurisdiction to scrutinise the fairness of legislative apportionment, under the 14th amendment and to take steps to assure that serious inequities were wiped out. The Courts have thus entered the 'political thicket'. The question of delimitation of constituencies cannot, of course, arise before Courts under our Constitution because of article 329.

(155) *Baker v. Carr* (1962) 369 US 186 makes the Court sit in judgment over the possession and distribution of political power which is an essential part of a Constitution. The magical formula of 'political question' is losing ground and it is to be hoped that a change may be soon coming. Many of the attacks on the amendments were the result of a misunderstanding that the Constitution was a compact between States and that the allocation of powers was not to be changed at all. This was finally decided by *Texas v. White* (1869) 7 Wall 700 as far back as 1869.

(156) The main question of implied limitations has evoked a spate of writings. Bryce<sup>53</sup>, Weaver<sup>54</sup>, Mathews<sup>55</sup>, Burdick<sup>56</sup>, Willoughby<sup>57</sup>, Willis<sup>58</sup>, Rottchaefers<sup>59</sup>, Orfield<sup>60</sup> (to name only a few) are of the opinion that there are no implied limitations, although, as Cooley points out, "it is sometimes expressly declared what indeed is implied without the declaration that everything in the declaration of rights contained is excepted out of the general powers of Government, and all laws contrary thereto shall be void."<sup>61</sup> Express checks there are only three. Two temporary checks were operative till 1808 and dealt with interference with importation of slaves and the levying of a direct tax without apportionment among the States, according to population. Permanent check that now remains is equality of representation of States in the Senate. Some writers suggest that this check may also be removed in two moves. By the first the article can be amended and by the second the equality removed. When this happens it will be seen whether the Supreme Court invokes any doctrine such as achieving indirectly what cannot be done directly.

53. *American Commonwealth*, Vol. I.

54. *Constitutional Law and Its Administration* (1946).

55. *American Constitutional System* (2nd Ed.), pp. 43-44.

56. *The Law of the American Constitution* (7th Imp.), p. 45.

57. *Tagore Law Lectures*, (1924).

58. *Constitutional Law of United States* (1936).

59. *Hand-book of American Constitutional Law*.

60. *The Amending of the Federal Constitution*.

61. *Constitutional Limitations*, Vol. I (8th Ed.), pp. 95-96.



(157) It will, of course, be completely out of place in a judgment to discuss the views of the several writers and so I shall confine myself to the observation of Orfield to whom again and again counsel for the State turned either for support or inspiration. According to him, there are no implied limitations *unless the Courts adopt that view* and, therefore, no limitations on the substance of the amendments except the Equality Clause. His view is that when Congress is engaged in the amending process it is not legislating but exercising a peculiar power bestowed by article V. I have already shown that under our constitution the amending process is a legislative process, the only difference being a special majority and the existence of article 13(2). Orfield brushes aside the argument that this would destroy the very concept of the Union which, as Chief Justice Marshall had said, was indestructible. Orfield faces boldly the question whether the whole constitution can be overthrown by an amendment and answers yes. But he says that the amendment must not be in violation of the Equality Clause. This seems to be a great concession. He makes this exception but Munro<sup>62</sup>, who finds it difficult to conceive of an unamendable constitution suggests that it should be possible to begin with that clause and then the door to amendments would be wide open. Of course, the Supreme Court has not yet faced an amendment of this character and it has not yet denied jurisdiction to itself. In the United States the Constitution works because, as observed by Willis, the Supreme Court is allowed to do "the work of remoulding the Constitution to keep it abreast with new conditions and new times, and to allow the agencies expressly endowed with the amending process to act only in extraordinary emergencies or when the general opinion disagrees with the opinion of the Supreme Court". In our country amendments so far have been made only with the object of negating the Supreme Court decisions, but more of it later.

(158) I have referred to Orfield although there are greater names than his expounding the same views. I have refrained from referring to the opposite view which in the words of Willoughby has been "strenuously argued by reputable writers" although Willis discourteously referred to them in his book. My reason for not doing so is plainly this. The process of amendment in the United States is clearly not a Legislative process and there is no provision like article 13(2) under which "laws" abridging or taking away Fundamental Rights can be declared void. Our liberal Constitution has given to the Individual all that he should have—freedom of speech, of association, of assembly, of religion, of motion and locomotion, of property and trade and profession. In addition it has made the State incapable of abridging or taking away these rights

62. *The Government of the United States* (5th Ed.), p. 77.

to the extent guaranteed, and has itself shown how far the enjoyment of those rights can be curtailed. It has given a guaranteed right to the person affected to move the Court. The guarantee is worthless if the rights are capable of being taken away. This makes our Constitution unique and the American precedents cannot be of much assistance.

(159) The Advocate-General of Madras relied upon Vedel.<sup>63</sup> According to Vedel, a prohibition in the Constitution against its own amendment has a political but not juridical value, and from the juridical point of view, a declaration of absolute constitutional immutability cannot be imagined. The constituent power being supreme, the State cannot be fettered even by itself. He notices, however, that the Constitution of 1791 limited the power of amendment (*revision*) for a certain time and that of 1875 prohibited the alternation of the Republican form of Government. He thinks that this hindrance can be removed by a two step amendment. He concludes that the constituent of today cannot bind the nation of tomorrow and no Constitution can prohibit its amendment in all aspects.

(160) Of course, the French have experimented with over a dozen Constitutions, all very much alike, while the British have slowly changed their entire structure from a monarchical executive to an executive from Parliament and have reduced the power of the House of Lords. Campbell-Bannerman, former Prime Minister of England summed up the difference to Ambassador M. de Fleurian thus:

"...Quand nous faisons une Revolution, nous ne detruisons pas notre maison, nous en conservons avec soin la facade et, derriere cette facade, nous reconstruisons une nouvelle maison. Vous, Francais, agissez autrement: vous jetez bas le vieil edifice et vous reconstruisez la meme maison avec une autre facade et sous un non different." (When we make a Revolution we do not destroy a house, we save with care the facade and behind construct a new house. You, Frenchmen, act differently. You throw down the old edifice and you reconstruct the same house with a different facade and under a different name.)

M. de Fleurian agreed that there was a lot of truth in it (*Il ya du Vrai dans cette boutade*).<sup>64</sup>

(161) But of course to a Frenchman brought up in a legal system in which the Courts do not declare even an ordinary statute to be invalid,

63. *Manuel Elementaire de Droit Constitutionnel* (Sirey), p. 117.

64. Recounted by M. de Fleurian in the Preface to J. Magnan de Bornier, L. 'Empire Britannique, son evolution Politique et Constitutionnelle' p. 6, quoted in Wheare: *Dominion Status*, p. 10.

the idea of the unconstitutionality of a constitutional amendment does not even occur. France and Belgium have created no machinery for questioning legislation and rely on moral and political sanctions. Even an English lawyer and less so an American lawyer finds it difficult to understand how the legality of an amendment of the Constitution can ever be questioned. It appears to them that the procedure for the amendment being gone through there is no one to question and what emerges is the Constitution as valid as the old Constitution just as binding. The matter, however, has to be looked at in this way. Where the Constitution is overthrown and the Courts lose their position under the old Constitution, they may not be able to pass on the validity of the new Constitution. This is the result of a revolution pure and simple. Where the new Constitution is not accepted and the people have not acquiesced in the change and the Courts under the old Constitution function, the Courts can declare the new Constitution to be void. Perhaps even when the people acquiesce and a new Government comes into being, the courts may still declare the new Constitution to be invalid but only if moved to do so. It is only when the Courts begin to function under the new Constitution that they cannot consider the vires of that Constitution because then they owe their existence to it. I agree with Orfield in these observations taken from his book. He, however, does not include *amendments* of the Constitution in these remarks and expressly omits them. His opinion seems to indicate that in the case of amendments courts are completely free to see that the prescribed constitutional mode of alternation is complied with and the alternation is within the permissive limits to which the Constitution wishes the amendments to go. This is true of all amendments but particularly of an amendment seeking to repeal the courts' decision and being small in dimension, leaves the Courts free to consider its validity. The Courts derive the power from the existing terms of the Constitution and the amendment fails if it seeks to overbear some existing restriction on legislation.

(162) What I have said does not mean that Fundamental rights are not subject to change or modification. In the most inalienable of such rights a distinction must be made between possession of a right and its exercise. The first is fixed and the latter controlled by justice and necessity. Take for example article 21:

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

Of all the rights, the right to one's life is the most valuable. This article of the Constitution, therefore, makes the right fundamental. But the inalienable right is curtailed by a murderer's conduct as viewed under

law. The deprivation, when it takes place, is not of the right which was immutable but of the continued exercise of the right. Take a Directive Principle which is not enforceable at law but where the same result is reached. The right to employment is a directive principle. Some countries even view it as a Fundamental Right. The exercise, however, of that right must depend upon the capacity of Society to afford employment to all and sundry. The possession of this right also cannot be confused with its exercise. One right here is positive and can be enforced although its exercise can be curtailed or taken away, the other is a right which the State must try to give but which cannot be enforced. The Constitution permits a curtailment of the exercise of most of the Fundamental Rights by stating the limits of that curtailment. But this power does not permit the State itself, to take away or abridge the right beyond the limits set by the Constitution. It must also be remembered that the rights of one individual are often opposed by the rights of another individual and thus also become limitative. The Constitution in this way permits the Fundamental Rights to be controlled in their exercise but prohibits their erasure.

(163) It is argued that such approach makes Society static and robs the State of its sovereignty. It is submitted that it leaves revolution as the only alternative if change is necessary. This is not right. The whole Constitution is open to amendment. Only two dozen articles are outside the reach of article 368. That too because the Constitution has made them fundamental. What is being suggested by the counsel for the State is itself a revolution because as things are that method of amendment is illegal. There is a legal method. Parliament must act in a different way to reach the Fundamental Rights. *The State must reproduce the power which it has chosen to put under a restraint.* Just as the French or the Japanese, etc. cannot change the articles of their Constitution which are made free from the power of amendment and must call a convention or a constituent body, so also we in India cannot abridge or take away the Fundamental Rights by the ordinary amending process. Parliament must amend article 368 to convoke another Constituent Assembly, pass a law under item 97 of the First List of the Schedule 7 to call a Constituent Assembly and then that assembly may be able to abridge or take away the Fundamental Rights if desired. It cannot be done otherwise. The majority in *Sajjan Singh's case*, 1965-1 SCR 933=(AIR 1965 SC 845), suggested bringing article 32 under the Proviso to improve protection to the Fundamental Rights. Article 32 does not stand in need of this protection. To abridge or take away that article (and the same is true of all other Fundamental Rights) a *constituent* body and not a *constituted* body is required. Parliament today is a *constituted* body with powers of legislation which include amendments of the Constitution by a special

majority but only so far as article 13(2) allows. To bring into existence a constituent body is not impossible as I had ventured to suggest during the hearing and which I have now more fully explained here. It may be said that this is not necessary because article 368 can be amended to confer on Parliament constituent powers over the Fundamental Rights. This would be wrong and against article 13(2). Parliament cannot increase its powers in this way and do indirectly which it is intended not to do directly. The State does not lose its Sovereignty but as it has chosen to create self-imposed restrictions through one constituent body, those restrictions cannot be ignored by a constituted body which makes laws. Laws so made can affect those parts of the Constitution which are outside the restriction in article 13(2) but any law (legislative or amendatory) passed by such a body must conform to that article. To be able to abridge or take away the Fundamental Rights which give so many assurances and guarantees a fresh Constituent Assembly must be convoked. Without such action the protection of the Fundamental Rights must remain immutable and any attempt to abridge or take them away in any other way must be regarded as revolutionary.

(161) I shall now consider the amendments of the Fundamental Rights made since the adoption of the Constitution, with a view to illustrating my meaning. Part III is divided under different headings. They are (a) General, (b) Right to Equality, (c) Right to Freedom, (d) Right against Exploitation, (e) Right to Freedom of Religion, (f) Cultural and Educational Rights, (g) Right to Property, (h) Right to Constitutional Remedies. I shall first deal with amendments of topics other than the topic (g)—Right to Property. The articles which were amended in the past are articles 15 and 19 by the 1st Amendment (18th June 1951) and Article 16 by the 7th Amendment (19 October 1956). The 16th Amendment added the words "the sovereignty and integrity of India" to some clauses. As that does not abridge or take away any Fundamental Right, I shall not refer to the 16th Amendment hereafter. That Amendment was valid. The changes so made may be summarized. In article 15, which deals with prohibition of discrimination on the ground of religion, race, caste, sex or place of birth, clause (3) allowed the State to make special provision for women and children. A new clause was added which reads:

"(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

It is argued by counsel for the State that by lifting the ban to make special provision for backward classes of citizens, there is discrimination

against the higher classes. This is the view which classes in a privileged position who had discriminated against the backward classes for centuries, might indeed take. But I cannot accept this contention. The Constitution is intended to secure to all citizens "Justice, social, economic and political" and "Equality of Status and Opportunity" (vide the Preamble) and the Directive Principles include article 38 which provides:

"38. The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice social, economic and political, shall inform all the institutions of the national life."

To remove the effect of centuries of discriminatory treatment and to raise the down-trodden to an equal status cannot be regarded as discriminatory against any one. It is no doubt true that in *State of Madras v. Champakam* 1951 SCR 525=(AIR 1951 SC 226) the reservation of seats for Backward Classes, Scheduled Castes and Tribes in public educational institutions was considered invalid. Articles 16(4) and 340 had already provided for special treatment for these backward classes and article 46 had provided that the State shall promote with special care their educational and economic interests. With all due respects the question of discrimination hardly arose because in view of these provisions any reasonable attempt to raise the status of the backward classes could have been upheld on the principle of classification. In any event, the inclusion of this clause to article 16 does not abridge or take away any one's Fundamental Rights unless the view be taken that the backward classes for ever must remain backward.

(165) By the First Amendment the second and the sixth clauses of article 19 were also amended. The original clause (2) was substituted by a new clause and certain words were added in clause (6). The changes may be seen by comparing the unamended and the amended clauses side by side:

\*19(1) All citizens shall have the right—

(a) to freedom of speech and expression;

× × × ×

(2) (Before Amendment) ; ; (After Amendment)

Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to or prevent the State from making any law relating to libel, slander, defamation, con-

Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exer-

tempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.

cise of the right conferred by the said sub-clause in the interest of the ..... security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

X

X

X

X

The amendment was necessary because in *Romesh Thapar v. State of Madras* 1950 SCR 594=(AIR 1950 SC 121), it was held that disturbances of public tranquillity did not come within the expression "undermines the security of the State". Later the Supreme Court itself observed in the *State of Bihar v. Shailabala Devi* 1952 SCR 654=(AIR 1952 SC 329) that this Court did not intend to lay down that an offence against public order could not in any case come within that expression. The changes related to (a) "friendly relations with foreign States", (b) "public order", and (c) "incitement to an offence" and the words "undermines the security of the State or tends to overthrow the State" were replaced by the words "in the interests of the security of the State." This change could be made in view of the existing provisions of the clause as the later decision of this Court above cited clearly show that "public order" and "incitement to offence" were already comprehended. The amendment was within the permissible limits as it did not abridge or take away any Fundamental Right.

(166) The Amending Act passed by Parliament also included a sub-section which read:

"(2) No law in force in the territory of India immediately before the commencement of the Constitution which is consistent with the provisions of article 19 of the Constitution as amended by sub-section (1) of this section shall be deemed to be void, or ever to have become void, on the ground only that, being a law which takes away or abridges the right conferred by sub-clause (a) of clause (1) of the said article, its operation was not saved by clause (2) of that article as originally enacted.

*Explanation*—In this sub-section, the expression "law in force" has the same meaning as in clause (1) of article 13 of this Constitution."

(167) This sub-section was not included in the Constitution. That device was followed in respect of certain State statutes dealing with property rights by including them in a new Schedule. It did not then occur to Parliament that the laws could be placed under a special umbrella of constitutional protection. Perhaps it was *not considered* necessary because article 19(2) was retrospectively changed, and the enactment of this sub-section was an ordinary legislative action. If the amendment had failed, the second sub-section of S. 3 would not have availed at all.

(168) Turning now to clause (6), we may read the original and the amended clause side by side:

"19. (1) All citizens shall have the right

×                      ×                      ×                      ×

(g) to practise any profession, or to carry on any occupation, trade or business.

×                      ×                      ×                      ×

(6) (Before Amendment)

(After Amendment)

Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the sub-clause, and, in particular nothing in the said sub-clause, shall affect the operation of any existing law in so far as it prescribes or empowers any authority to prescribe, or prevent the State from making any law prescribing or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business.

Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause, shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State of any trade, business, industry or service, whether to the exclusion, complete or partial of citizens or otherwise."



The first change is in the verbiage and is not one of substance. It only removes some unnecessary words. The new sub-clause is innocuous except where it provides for the exclusion of citizens. It enables nationalisation of industries and trade. Sub-clause (g) (to the generality of which the original clause (6) created some exceptions) allowed the State, to make laws imposing, in the interests of the general public, reasonable, restrictions on the exercise of the right conferred by the sub-clause. A law creating restrictions can, of course, be made outside the Constitution or inside it. If it was considered that this right in the State was required in the interests of the general public, then the exercise of the right to practise profession or to carry on an occupation, trade or business could be suitably curtailed. It cannot be said that nationalisation is never in the interest of the general public. This amendment was thus within the provision for restricting the exercise of the Fundamental Right in sub-cl. (g) and was perfectly in order.

(169) The Seventh Amendment introduced certain words in article 16(3). The clauses may be compared:

(3) (Before Amendment)

Nothing in this article shall prevent Parliament from making any law prescribing in regard to a class or classes of employment or appointment to an office under any State specified in the First Schedule or any local or other authority within its territory, any requirement as to residence within the State prior to such employment or appointment.

(After Amendment)

Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

The change is necessary to include a reference to Union territory. It has no bearing upon Fundamental Rights and neither abridges nor takes away any of them. In the result none of the amendments of the articles in parts other than that dealing with Right to Property is outside the amending process because article 13(2) is in no manner breached.

(170) This brings me to the main question in this case. It is, whether the amendments of the part Right to Property in Part III of the Constitution were legally made or not. To understand this part of the case I must first begin by discussing what property rights mean and how they were safeguarded by the Constitution as it was originally framed. "Right to Property" in Part III was originally the subject of one article, namely, article 31. Today there are three articles 31, 31-A and 31-B and the Ninth Schedule. The original thirty-first article read:

"31. Compulsory acquisition of property:—

- (1) No person shall be deprived of his property save by authority of law.
- (2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principle on which, and the manner in which, the compensation is to be determined and given.
- (3) No such law as is referred to in clause (2) made by the Legislature of the State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.
- (4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).
- (5) Nothing in clause (2) shall affect:—
  - (a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or
  - (b) the provisions of any law which the State may hereafter make:—
    - (i) for the purpose of imposing or levying any tax or penalty, or
    - (ii) for the promotion of public health or the prevention of danger to life or property, or
    - (iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.
- (6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within

three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935."

(171) The provisions of this article are intended to be read with article 19(1) (f) which reads:

"19 (1) All citizens shall have the right

×                      ×                      ×                      ×

(f) to acquire, hold and dispose of property."

Article 19(1) (f) is subject to clause (6) which I have already set out elsewhere and considered. Ownership and exchange of property are thus recognised by the article. The word 'property' is not defined and I shall presently consider what may be included in 'property'. Whatever the nature of property, it is clear that the first clause of article 31 the right to property may be taken away under authority of law. This was subject to one condition under the original article 31, namely, that the law must either fix the compensation for the deprivation or specify the principles on which and the manner in which compensation was to be determined and given. This was the heart of the institution of property as understood by the Constituent Assembly. The rest of the article only gave constitutional support against the second clause, to legislation already on foot in the States. This created a Fundamental Right in property. The question may now be asked: why was it necessary to make such a Fundamental Right at all?

(172) There is no natural right in property and as Burke said in *his Reflections*, Government is not made in virtue of natural rights, which may and do exist in total independence of it. Natural rights embrace activity outside the status of citizen. Legal rights are required for free existence as a social being and the State undertakes to protect them. Fundamental Rights are those rights which the State enforces against itself. Looking at the matter briefly but historically, it may be said that the Greeks were not aware of these distinctions for as Gierke<sup>65</sup> points out they did not distinguish between personality as a citizen and personality as a human being. For them the Individual was merged in the Citizen and the Citizen in the State. There was personal liberty and private law but there was no sharp division between the different kinds of laws. The

65. *Das Deutsche Genossenschaftsrecht* (III, 10).

Romans evolved this gradually, not when the Roman Republic existed, but when the notion of a *Fiscus* developed in the Empire and the legal personality of the Individual was separated from his membership of the State. It was then that the State began to recognize the rights of the individual in his dealing with the State. It was Cicero<sup>66</sup> who was the first to declare that the primary duty of the Governor of a State was to secure to each individual in the possession of his property. Here we may see a recognition of the ownership of property as a Fundamental Right. This idea was so engrained in early social philosophy that we find Locke opining in his '*Civil Government*' (Ch. 7) that "Government has no other end but the preservation of property". The concepts of liberty, equality and religious freedom were well-known. To them was added the concept of property rights. Later the list included "*equalitas, libertas, ius securitatis, ius defensions, and ius puniendi.*" The concept of property right gained further support from Bentham and Spencer and Kant and Hegel.<sup>67</sup> The term property in its pristine meaning embraced only land but it soon came to mean much more. According to Noyes.<sup>68</sup>

"Property is any protected right or bundle of rights (interest or thing) with direct or indirect regard to any external object (*i. e.* other than the person himself) which is material or quasi material (*i. e.* a protected process) and which the then and there organisation of Society permits to be either private or public, which is connoted by the legal concepts of occupying, possessing or using."

The right is enforced by excluding entry or interference by a person not legally entitled. The position of the State *vis-a-vis* the individual is the subject of articles 19 and 31, 31-A and 31-B.

(173) Now in the enjoyment, the ultimate right may be an interest which is connected to the object through a series of intermediaries in which each 'holder' from the last to the first 'holds of' 'the holder' before him. Time was when there was a lot of 'free property' which was open for appropriation. As Noyes<sup>69</sup> puts it, "all physical manifestations capable of being detected, localised and identified" can be the objects of property. One exception now made by all civilized nations is that human beings are no longer appropriable. If any free property was available then it could be brought into possession and ownership by mere taking. It has been very aptly said that all private property is a system of monopolies and the right to monopolise lies at the foundation of the institution of

66. De Off. (The Offices) II Ch. XXI (Everyman), p. 103.

67. W. Friedmann: *Legal Theory* (4th Ed.), pp. 373-76.

68. *The Institution of Property* (1936), p. 436.

69. *Ibid.*, p. 433.

property. Pound<sup>70</sup> in classifying rights *in rem* puts private property along with personal integrity right against injury to life, body and health (bodily or mental), personal liberty (*free motion and locomotion*), Society and control of one's family and dependents. An extremely valuable definition of ownership is to be found in the *Restatement of the Law of Property* where it is said:

"It is the totality of rights as to any specific objects which are accorded by law, at any time and place, after deducting social reservations."

This is the core from which some rights may be detached but to which they must return when liberated.

(174) The right to property in its primordial meaning involved the acquisition of a free object by possession and conversion of this possession into ownership by the protection of State or the ability to exclude interference. As the notion of a State grew, the right of property was strong or weak according to the force of political opinion backing it or the legislative support of the State. The English considered the right as the foundation of society. Blackstone<sup>71</sup> explained it on religious and social grounds claiming universality for it and called it the right of the English people. William Paley<sup>72</sup> although he thought the institution paradoxical and unnatural, found it full of advantages, and Mackintosh in his famous diatribe against the French Revolution described it as the "Sheet-anchor of society". This institution appeared in the Magna Carta, in the American Declaration of Independence and the French Declaration of Rights of Man. Later we find it in many Constitutions described as Fundamental, general and guaranteed<sup>73</sup>.

(175) Our Constitution accepted the theory that Right of Property is a fundamental right. In my opinion it was an error to place it in that category. Like the original article 16 of the Draft Bill of the Constitution which assured freedom of trade, commerce and intercourse within the territory of India as a fundamental right but was later removed, the right of property should have been placed in a different chapter. Of all the fundamental rights it is the weakest. Even in the most democratic of Constitutions, (namely, the West German Constitution of 1949) there was a provision that lands, minerals and means of production might be

70. *Readings*, p. 420.

71. *Commentaries*.

72. *Moral Philosophy*.

73. Under the Constitution of Norway the rights (Odels and Asatte rights) cannot be abolished but if the State requires the owner must surrender the property and he is compensated.

socialised or subjected to control. Article 31, if it contemplated socialisation in the same way in India, should not have insisted so plainly upon payment of compensation. Several speakers warned Pandit Nehru and others of the danger of the second clause of article 31, but it seems that the Constituent Assembly was quite content that under it the Judiciary would have no say in the matter of compensation. Perhaps the dead hand of S. 299 of the Constitution Act of 1935 was upon the Constituent Assembly. Ignored were the resolutions passed by the National Planning Committee of the Congress (1941) which had advocated the co-operative principle for exploitation of land, the Resolution of 1947 that land with its mineral resources and all other means of production as well as distribution and exchange must belong to and be regulated by the Community, and the warning of Mahatma Gandhi that if compensation had to be paid we would have to rob Peter to pay Paul<sup>74</sup>. In the Constituent Assembly the Congress (which wielded the majority then, as it does today) was satisfied with the Report of the Congress Agrarian Reforms Committee 1949 which declared itself in favour of the elimination of all intermediaries between the State and the tiller and imposition of prohibition against subletting. The Abolition Bills were the result. Obviously the Sardar Patel Committee on Fundamental Rights was not prepared to go far. In the debates that followed, many amendments and suggestions to alter the draft article protecting property, failed. The attitude was summed up by Sardar Patel. He conceded that land would be required for public purposes but hopefully added: "not only land but so many other things may have to be acquired. And the State will acquire them after paying compensation and not expropriate them."<sup>75</sup>

(176) What was then the theory about Right to Property accepted by the Constituent Assembly? Again I can only describe it historically. Grotius<sup>76</sup> had treated the right as an acquired right (*ius quaesitum*) and ownership (*dominium*) as either serving individual interests (*vulgare*) or for the public good (*eminens*). According to him, the acquired right had to give way to eminent domain (*ex vi super-eminentis domini*) but there must be public interest (*publica utilitas*) and if possible compensation. In the social contract theory also the contract included protection of property with recognition of the power of the ruler to act in the public interest and emergency. Our constitutional theory treated property rights as inviolable except through law for public good and on payment of compensation. Our Constitution saw the matter in the way of Grotius but

74. See *Constituent Assembly Debates*, Vol. IX, pp. 1204-6.

75. *Ibid.*, Vol. I, p. 517.

76. Grotius: *De jure Belli Pacis*, II c. 2 § 2(5) § 6. I c 1 § 6 and II c 14 §§7 and 8.

overlooked the possibility that just compensation may not be possible. It follows almost literally the German jurist Ulrich Zasius (except in one respect) : *Princeps non potest auferremihi rem meam sive iure gentium, sive civile sit facta mea.*

(177) All would have been well if the Courts had construed article 31 differently. However, the decisions of the High Courts and the Supreme Court, interpreting and expounding this philosophy took a different view of compensation. I shall refer only to some of them. First the Patna High Court in *Kameshwar v. Bihar* (AIR 1951 Pat. 91) applied article 14 to strike down the Reforms Act in Bihar holding it to be discriminatory. This need not have occasioned an amendment because the matter could have been righted, as indeed it was, by an appeal to the Supreme Court (see *State of Bihar v. Kameshwar* 1952 S.C.R. 889). The Constitution (First Amendment) Act, 1951 followed. It left article 31 intact but added two fresh articles, articles 31-A and 31-B which are respectively headed "saving of laws providing for acquisition of estates etc." and "Validation of certain Acts and Regulations" and added a schedule Ninth to be read with article 31-B naming therein thirteen Acts of the State Legislatures. Article 31-A was deemed always to have been inserted and article 31-B wiped out respectively all decisions of the courts which had declared any of the scheduled Acts to be invalid. The texts of these new articles may now be seen,

"31-A Saving of laws providing for acquisition of estates etc.

- (1) Notwithstanding anything in foregoing provisions of this Part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part;

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

- (2) In this article,

- (a) The expression 'estate' shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any *jagir*, *inam* or *muafi* or other similar grant;

(b) The expression 'right' in relation to an estate shall include any rights vesting in a proprietor, sub-proprietor, tenure-holder or other intermediary and any rights or privileges in respect of land revenue."

### 31-B. Validation of certain Acts and Regulations.

Without prejudice to the generality of the provisions contained in article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provision of this Part and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

Article 31-A has been a protean article. It has changed its face many times. Article 31-B has remained the same till today but the Ninth Schedule has grown. The Constitution (Fourth Amendment) Act 1955, took the number of the Schedule statutes to 20 and the Constitution (Seventeenth Amendment) Act, 1964 to 64 and a so called explanation which saved the application of the Proviso in article 31-A was also added. The device (approved by *Shankari Prasad's* case, 1952 SCR '89: AIR 1951 SC 458) was found so attractive that many more Acts were sought to be included but were dropped on second thoughts. Even so, one wonders how the Railway Companies (Emergency Provisions) Act 1951, the West Bengal Land Development and Planning Act and some others could have been thought of in this connection. By this device which can be extended easily to other spheres, the Fundamental Rights can be completely emasculated by a 2/3 majority even though they cannot be touched in the ordinary way by a unanimous vote of the same body of men. The State Legislatures may drive a coach and pair through the Fundamental Rights and the Parliament by 2/3 majority will then put them outside the jurisdiction of the Courts. Was it really intended that the restriction against the State in Article 13(2) might be overcome by the two agencies acting hand in hand?

(178) Article 31-A dealt with the acquisition by the State of an 'estate' or of any rights therein or the extinguishment or modification of any such rights. A law of the State could do these with the President's assent, although it took away or abridged any of the rights conferred by any provisions of Part III. The words 'estate' and 'rights in relation to



an estate' were defined. The constitutional amendment was challenged in *Shankari Prasad's* case, 1952 SCR 89: (AIR 1951 SC 458) on various grounds but was upheld mainly on two grounds to which I objected in *Sajjan Singh's* case, 1965-1 SCR 933: (AIR 1965 SC 845). I have shown in this judgment, for reasons which I need not repeat and which must be read in addition to what I said on the earlier occasion, that I disagree respectfully but strongly with the view of the Court in those two cases. This touches the first part of the amendment which created article 31-A. I do not and cannot question article 31-A because (a) it was not considered at the hearing of this case, and (b) it has stood for a long time as part of the Constitution under the decision of this Court and has been acquiesced in by the people. If I was free I should say that the amendment was not legal and certainly not justified by the reasons given in the earlier cases of this Court. Under the original article 31, compensation had to be paid for acquisition by the State. This was the minimum requirement of article 31(1) and (2) and no amendment could be made by a *constituted Parliament* to avoid compensation. A law made by a *constituted Parliament* had to conform to article 13(2) and article 31 could not be ignored.

(179) In 1954 the Supreme Court in a series of cases drew the distinction between article 19(1) (f) and article 31, particularly in *West Bengal v. Subodh Gopal*, 1954 SCR 587: (AIR 1954 SC 92), *Dwarkanadas Srinivas v. Sholapur Spinning Co.* 1954 SCR 674: (AIR 1954 SC 119). In *State of West Bengal v. Mrs. Bela Banerjee and others* 1954 SCR 558: (AIR 1954 SC 170), this Court held that compensation in article 31(2) meant just equivalent, i. e. 'full and fair money equivalent' thus making the adequacy of compensation justiciable.

(180) The Constitution (Fourth Amendment) Act, 1955 then amended both article 31 and article 31-A. Clause (2) of article 31 was substituted by—

- “(2) No property shall be compulsorily acquired or requisitioned, save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.”

The opening words of the former second clause were modified to make them more effective but the muzzling of courts in the matter of adequacy of the compensation was the important move. As Basu says:

"It is evident that the 1955 amendment of clause (2) eats into vitals of the Constitutional mandate to pay compensation and demonstrates a drift from the moorings of the American concept of private property and judicial review to which our Constitution was hitherto tied, to that of Socialism"<sup>77</sup>

It is appropriate to recall here that as expounded by Professor Beard<sup>78</sup> (whose views offended Holmes and the Times of New York but which are now being recognised after his further explanation<sup>79</sup>) the Constitution of the United States is an economic document prepared by men who were wealthy or allied with property rights, that it is based on the concept that the fundamental rights of property are anterior to Government and morally beyond the reach of popular majorities and that the Supreme Court of the United States preserved the property rights till the New Deal era. The threat at that time was to enlarge the Supreme Court but not to amend the Constitution. It appears that the Indian Socialists charged with the idea of Marx, the Webbs, Green, Laski and others viewed property rights in a different way. Pandit Nehru once said that he had no property sense, meaning that he did not value property at all. The Constitution seems to have changed *its property sense* significantly. In addition to avoiding the concept of just compensation, the amendment added a new clause (2A) as follows —

"(2A) where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property"

This narrowed the field in which compensation was payable. In addition to this, clause (1) of article 31-A was substituted and was deemed to be always substituted by a new clause which provided

"(1) Notwithstanding any thing contained in article 13, no law providing for—

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

77 Basu *Commentaries on the Constitution of India* (5th Ed.) Vol 2, p 230

78 See *An Economic Interpretation of the United States Constitution*

79 See Laski *The American Democracy* Weaver *Constitutional Law* Brown *Charles Beard and the Constitution* Willis *Constitutional Law*

- (b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or
- (c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporation, or
- (d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of share-holders thereof, or
- (e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

In clause (2)(a) after the word 'grant', the words "and in any State of Madras and Travancore Cochin, *Janmam* right" were inserted and deemed always to have been inserted, and in clause (2)(b) after words 'tenure-holder' the words 'raiyat, under raiyat' were inserted and deemed always to have been inserted. Once again the reach of the State towards private property was made longer and curiously enough it was done retrospectively from the time of the Constituent Assembly and, so to speak, in its name. As to the retrospective operation of these constitutional amendments I entertain considerable doubt. A Constituent Assembly makes a new Constitution for itself. Parliament is not even a Constituent Assembly and to abridge fundamental rights in the name of the Constituent Assembly appears anomalous. I am reminded of the conversation between Napoleon and Abe Sieyes, the great jurist whose ability to draw up one Constitution after another has been recognised and none of whose efforts lasted for long. When Napoleon asked him "What has survived?" Abe Sieyes answered "I have survived." I wonder if the Constituent Assembly will be able to say the same thing. What it had written on

the subject of property rights, appears to have been written on water. The Fourth Amendment served to do away with the distinction made by this Court between articles 19 and 31 and the theory of just compensation. The Fourth Amendment has not been challenged before us. Nor was it challenged at any time before. For the reasons for which I have declined to consider the First Amendment I refrain from considering the validity of the Fourth Amendment. It may, however, be stated here that if I was free to consider it, I would have found great difficulty in accepting that the constitutional guarantee could be abridged in this way.

(181) I may say here that the method I have followed in not reconsidering an amendment which has stood for a long time, was also invoked by the Supreme Court of United States in *Leser v. Carnett* (1922), 258 US 130. A constitution works only because of universal recognition. This recognition may be voluntary or forced where people have lost liberty of speech. But the acquiescence of the people is necessary for the working of the Constitution. The examples of our neighbours, of Germany, of Rhodesia and others illustrate the recognition of Constitutions by acquiescence. It is obvious that it is good sense and sound policy for the courts to decline to take up an amendment for consideration after a considerable lapse of time when it was not challenged before, or was sustained on an earlier occasion after challenge.

(182) It is necessary to pause here and see what the property rights have become under the repeated and retrospective amendments of the Constitution. I have already said that the Constitution started with the concept of which Grotius may be said to be the author, although his name is not particularly famous for theories of constitutional or municipal laws. The socialistic tendencies which the amendments now manifest take into consideration some later theories about the institution of property. When the original article 31 was moved by Pandit Jawaharlal Nehru, he had described it as a compromise between various approaches to the question and said that it did justice and equality not only to the Individual but also to the Community. He accepted the principle of compensation but compensation as determined by the Legislatures and not the judiciary. His words were:

"The law should do it. Parliament should do it. There is no reference in this to any judiciary coming into the picture. Much thought has been given to it and there has been much debate as to where the judiciary comes in. Eminent lawyers have told us that on a proper construction of this clause, normally speaking the judiciary should not come in. Parliament fixes either the compensation itself or the principle governing that compensation and they

should not be challenged except for one reason, where it is thought that there has been a gross abuse of the law, where, in fact, there has been a fraud on the Constitution. Naturally the judiciary comes in to see if there has been a fraud on the Constitution or not."<sup>80</sup>

He traced the evolution of property and observed that property was becoming a question of credit, of monopolies, that there were two approaches, the approach of the Individual and the approach of the Community. He expressed himself for protection of the Individual's rights.<sup>81</sup> The attitude changed at the time of the First Amendment. Pandit Nehru prophesied that the basic problem would come before the House from time to time. That it has, there is no doubt, just as there is no doubt that each time the Individual's rights have suffered.

(183) Of course, the growth of collectivist theories have made elsewhere considerable inroads into the right of property. In Russia there is no private ownership of Land and even in the Federal Capital Territory of Australia, the ownership of land is with the Crown and the Individual can get a leasehold right only. Justification for this is found in the fact that the State must benefit from the rise in the value of land. *The paucity of land and of dwelling houses have led to the control of urban properties and creation of statutory tenancies.* In our country a ceiling is put on agricultural land held by an individual. The Supreme Court, in spite of this, has not frustrated any genuine legislation for agrarian reform. It has upheld the laws by which the lands from latifundia have been distributed among the landless. It seems that as the Constitutions of Peru, Brazil, Poland, Latvia, Lethuania and Mexico contain provisions for such reforms, mainly without payment of compensation, our Parliament has taken the same road. Of course, the modern theory regards the institution of property on a functional basis<sup>82</sup> which means that property to be productive must be properly distributed. As many writers have said property is now a duty more than a right and ownership of property entails a social obligation. Although Duguit<sup>83</sup>, who is ahead of others, thinks that the institution of property has undergone a revolution, the rights of the Individual are not quite gone, except where Communism is firmly entrenched. The rights are qualified but property belongs still to the owner. The Seventeenth Amendment, however, seems to take us far away from even this qualified

80. *C. A. Debates*, Vol. IX, pp. 1193-1195.

81. *Ibid.*, Vol. IX, p. 1135.

82. See G. W. Paton : *Text Book of Jurisprudence*, 1961, pp. 484-485

83. *Transformations du droit privé*.

concept, at least in so far as "estates" as defined by article 31-A. This is the culmination of a process.

(184) Previous to the Constitution (Seventeenth Amendment) Act the Constitution (Seventh Amendment) Act, 1956 had given power indirectly by altering entry No. 42 in List III. The entries may be read side by side.

"42 Before Amendment

After Amendment

Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined, and the form and the manner in which such compensation is to be given.

Acquisition and requisitioning of property.

This removed the last reference to compensation in respect of acquisition and requisition. What this amendment began, the Constitution (Seventeenth Amendment) Act, 1964 achieved in full. The Fourth Amendment had added to the comprehensive definition of 'right' in relation to an estate, the rights of *raiylats* and *under-raiylats*. This time the expression 'estate' in article 31-A was amended retrospectively by a new definition which reads:

"the expression 'estate' shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include:

- (i) any *Jagir*, *Inam* or *Muafi* or other similar grant and in the States of Madras and Kerala, any *Janmam* right;
- (ii) any land held under ryotwari settlement;
- (iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans."

The only saving of compensation is not to be found in the second proviso added to clause (1) of the article which reads:

"Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is

within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof."

There is also the provision for compensation introduced indirectly in an Explanation at the end of the Ninth Schedule, in respect of the Rajasthan Tenancy Act, 1955. By this Explanation the provisions of this Tenancy Act in conflict with the proviso last quoted are declared to be void.

(185) The sum total of this amendment is that except for land within the ceiling, all other land can be acquired or rights therein extinguished or modified without compensation and no challenge to the law can be made under articles 14, 19 or 31 of the Constitution. The same is also true of the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or the amalgamation of two or more companies, or the extinguishment or modification of any rights of managing agents, secretaries, treasurers, managing directors, directors or managers, of corporations or of any voting right, of shareholders thereof or of any rights by virtue of any agreement, lease, or licence for the purpose of searching for, or winning, any mineral or mineral oil, or of the premature termination or cancellation of any such agreement, lease or licence.

(186) It will be noticed further that deprivation of property of any person is not to be regarded as acquisition or requisition unless the benefit of the transfer of the ownership or right to possession goes to the State or to a corporation owned or controlled by the State. Acquisition or requisition in this limited sense alone requires that it should be for public purpose and under authority of law which fixes the compensation or lays down the principles on which and the manner in which compensation is to be determined and given and the adequacy of the compensation cannot be any ground of attack. Further still acquisition of estates and of rights therein and the taking over of property, amalgamation of corporations, extinguishment or modification of rights in companies and mines may be made regardless of articles 14, 19 and 31. In addition 64 State Acts are given special protection from the courts regardless of their contents which may be in derogation of the Fundamental Rights.

(187) This is the kind of amendment which has been upheld in *Sajjan Singh's* case, 1965-1 SCR 933: (AIR 1965 SC 845) on the theory of the omnipotence of article 368. The State had bound itself not to enact any law in derogation of Fundamental Rights. Is the Seventeenth

Amendment a law? To this question my answer is a categorical yes. It is no answer to say that this is an amendment and, therefore, not a law, or that it is passed by a special power of voting. It is the action of the State all the same. The State had put restraints on itself in law-making whether the laws were made without or within the Constitution. It is also no answer to say that this Court in a Bench of five judges on one occasion and by a majority of 3 to 2 on another, has said the same thing. In a matter of the interpretation of the Constitution this Court must look at the functioning of the Constitution as a whole. The rules of *res judicata* and *stare decisis* are not always appropriate in interpreting a Constitution, particularly, when article 13(2) itself declares a law to be void. The sanctity of a former judgment is for the matter then decided. In *H.A. Plessy v. J.H. Fergusson*<sup>83a</sup> Harlan J. alone dissented against the 'separate but equal' doctrine uttering the memorable words that there was no caste and the Constitution of the United States was 'colour blind'. This dissent made some Southern senators to oppose his grandson (Mr. Justice John Marshall Harlan) in 1954. It took fifty-eight years for the words of Harlan J's lone dissent (8 to 1) to become the law of the United States at least in respect of segregation in the public schools.<sup>83b</sup> As Mark Twain said very truly "Loyalty to a petrified opinion never yet broke a chain or freed a human soul."

(188) I am apprehensive that the erosion of the right to property may be practised against other Fundamental Rights. If a halt is to be called, we must declare the right of Parliament to abridge or take away Fundamental Rights. Small inroads lead to larger inroads and become as habitual as before our freedom was won. The history of freedom is not only how freedom is achieved but how it is preserved. I am of opinion that an attempt to abridge or take away Fundamental Rights even through an amendment of the Constitution can be declared void. This Court has the power and jurisdiction to make the declaration. I dissent from the opposite view expressed in *Sajjan Singh's* case, 1965-1 SCR 933; (AIR 1965 SC 845), and I overrule that decision.

(189) It remains to consider what is the extent of contravention. Here I must make it clear that since the First, Fourth and Seventh Amendments are not before me and I have not, therefore, questioned them, I must start with the provisions of articles 31, 31-A, 31-B, List III and the Ninth Schedule as they were immediately preceding the Seventeenth Amendment. I have elsewhere given a summary of the inroads made into property rights of individuals and corporations by these earlier

83a. (1895) 163 US 537.

83b. See *O. Brown v. Board of Education of Topeka*, (1954) 347 US 483.



amendments. By this amendment the definition of 'estate' was repeated for the most part but was extended to include:

- “(ii) any land held under ryotwari settlement;
- (iii) any land held or let for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans.”

Further reach of acquisition or requisition without adequate compensation and without a challenge under articles 14, 19 and 31 has now been made possible. There is no kind of agricultural estate or land which cannot be acquired by the State even though it pays an illusory compensation. The only exception is the second proviso added to article 31-A (1) by which, lands within the ceiling limit applicable for the time being to a person personally cultivating his land, may be acquired only on paying compensation at a rate which shall not be less than the market value. This may prove to be an illusory protection. The ceiling may be lowered by legislation. The State may leave the person and owner in name and acquire all his other rights. The latter question did come before this Court in two cases *Ajit Singh v. State of Punjab*<sup>83c</sup> and *B. Ram and others v. State of Punjab and others*<sup>83d</sup> decided on December 2, 1966. My brother Shelat and I described the device as a fraud upon this proviso but it is obvious that a law lowering the ceiling to almost nothing cannot be declared a fraud on the Constitution. In other words, the agricultural land-holders hold land as tenants-at-will. To achieve this a large number of Acts of the State Legislature have been added to the Ninth Schedule to bring them under the umbrella of article 31-B. This list may grow.

(190) In my opinion the extension of the definition 'estate' to include *ryotwari* and agricultural lands is an inroad into the Fundamental Rights but it cannot be questioned in view of the existence of article 31-A(1) (a) as already amended. The Constitutional amendment is a law and article 31(1) permits the deprivation of property by authority of law. The law may be made outside the Constitution or within it. The word 'law' in this clause includes both ordinary law or an amendment of the Constitution. Since 'no law providing for the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by articles 14, article 19 or article 31', the Seventeenth Amendment when

83c. Civil Appeal No. 1018 of 1966 (SC).

83d. Writ Petition No. 125 of 1966 (SC).

it gives a new definition of the word 'estate' cannot be questioned by reason of the Constitution as it exists. The new definition of estate introduced by the amendment is beyond the reach of the Courts not because it is not law but because it is 'law' and falls within that word in article 31(1) (2) (2-A) and article 31-A(1). I, therefore, sustain the new definition, not on the erroneous reasoning in *Sajjan Singh's case*, 1965-1 SCR 933=(AIR 1965 SC 845), but on the true construction of the word 'law' as used in articles 13(2), 31 (1) (2) (2-A) and 31-A(1). The above reason applies *a fortiori* to the inclusion of the proviso which preserves (for the time being) the notion of compensation for deprivation of agricultural property. The proviso at least saves something. It prevents the agricultural lands below the ceiling from being appropriated without payment of proper compensation. It is clear that the proviso at least cannot be held to abridge or take away fundamental rights. In the result I uphold the second section of Constitution (Seventeenth Amendment) Act, 1964.

(191) This brings me to the third section of the Act. That does no more than add 44 State Acts to the Ninth Schedule. The object of article 31-B, when it was enacted, was to save certain State Acts notwithstanding judicial decision to the contrary. These Acts were already protected by article 31. One can with difficulty understand such a provision. Now the Schedule is being used to give advance protection to legislation which is known or apprehended to derogate from the Fundamental Rights. The power under article 368, whatever it may be, was given to amend the Constitution. Giving protection to statutes of State Legislatures which offend the Constitution in its most fundamental part can hardly merit the description amendment of the Constitution. In fact, in some cases it is not even known whether the statutes in question stand in need of such aid. The intent is to silence the Courts and not to amend the Constitution. If these Acts were not included in the Schedule they would have to face the Fundamental Rights and rely on articles 31 and 31-A to save them. By this device protection far in excess of these articles is afforded to them. This in my judgment is not a matter of amendment at all. This power which is given is for the specific purpose of amending the Constitution and not to confer validity on State Acts against the rest of the Constitution. If the President's assent did not do this, no more would this section. I consider S. 3 of the Act to be invalid as an illegitimate exercise of the powers of amendment, however, generous. Ours is the only Constitution in the world which carries a long list of ordinary laws which it protects against itself. In the result I declare S. 3 to be *ultra vires* the amending process.

(192) As stated by me in *Sajjan Singh's case*, 1965-1 SCR 933=(AIR 1965 SC 845), article 368 outlines a process, which, if followed

strictly, results in the amendment of the Constitution. The article gives power to no particular person or persons. All the named authorities have to act according to the letter of the article to achieve the result. The procedure of amendment, if it can be called a power at all, is a legislative power but is *sui generis* and outside the three lists in Schedule 7 of the Constitution. It does not have to depend upon any entry in the lists.

(193) Ordinarily there would be no limit to the extent of the amendatory legislation but the Constitution itself makes distinctions. It states three methods and places certain bars. For some amendments an ordinary majority is sufficient; for some others a 2/3rd majority of the members, present and voting with a majority of the total members in each House is necessary; and for some others in addition to the second requirement; ratification by at least one half of the Legislatures of the States must be forthcoming. Besides these methods, article 13(2) puts an embargo on the legislative power of the State and consequently upon the agencies of the State. By its means the boundaries of legislative action of any kind including legislation to amend the Constitution have been marked out.

(194) I have attempted to show here that under our Constitution revolution is not the only alternative to change of Constitution under article 368. A Constitution can be changed by consent or revolution. Roder, Anderson and Christol<sup>84</sup> have shown the sovereignty of the People is either electoral or constituent. When the People elect the Parliament and the Legislatures they exercise their electoral sovereignty. It includes some constituent sovereignty also but only in so far as conceded. The remaining constituent sovereignty which is contained in the Preamble and Part III is in abeyance because of the curb placed by the People on the State under article 13(2). It is this power which can be reproduced. I have indicated the method. Watson<sup>85</sup> (quoting Ames—On Amendments p. 1 note 2) points out that the idea that provision should be made in the instrument of Government itself for the method of its amendment is peculiarly American. But even in the Constitution of the United States of America some matters were kept away from the amendatory process either temporarily or permanently. Our Constitution has done the same. Our Constitution provides for minorities, religions, socially and educationally backward peoples, for ameliorating the condition of depressed classes, for removing class distinctions, titles etc. This reserva-

84. *Introduction to Political Science*, p. 32 et. seq.

85. *Constitution, Its History, Application and Construction*, Vol. II (1910), p. 1301.

tion was made so that in the words of Madison<sup>86</sup>, men of factious tempers, of local prejudices, or sinister designs may not by intrigue, by corruption, or other means, first obtain the suffrages and then betray the interests of the people. It was to plug the loophole such as existed in section 48 of the Weimar Constitution<sup>87</sup> that article 13(2) was adopted. Of course, as Story<sup>88</sup> says, an amendment process is a safety valve to let off all temporary effervescence and excitement, as an effective instrument to control and adjust the movements of the machinery when out of order or in danger of self-destruction. But is not an open valve to let out even that which was intended to be retained. In the words of Wheare<sup>89</sup>, the people or a Constituent Assembly acting on their behalf has authority to enact a Constitution and by the same token a portion of the Constitution placed outside the amendatory process by one Constituent body can only be amended by another constituent body only. In the Commonwealth of Australia Act the provisions of the last paragraph of S. 128 have been regarded as mandatory and held to be clear limitations of the power of amendment. Dr. Jethro Brown considered that the amendment of the paragraph was logically impossible even by a two step amendment. Similarly, S. 105-A has been judicially considered in the *Garnishee* case (46 CLR 145) to be an exception to the power of amendment in S. 128 although Wynes<sup>90</sup> does not agree. I prefer the judicial view to that of Wynes. The same position obtains under our Constitution in article 35 where the opening words are more than a *non-obstante* clause. They exclude article 368 and even amendment of that article under the proviso. It is, therefore, a grave error to think of article 368 as a code or as omniscient. It is the duty of this Court to find the limits which the Constitution has set on the amendatory power and to enforce those limits. This is what I have attempted to do in this Judgment.

(193) My conclusions are :

- (i) that the Fundamental Rights are outside the amendatory process if the amendment seeks to *abridge or take away* any of the rights;
- (ii) that *Shankari Prasad's* case, 1952 SCR 89=(AIR 1951 SC 458) and *Sajjan Singh's* case, 1965-1 SCR 933=(AIR 1965 SC 845), which followed it conceded the power of amendment

86. Federalist No. 10.

87. See Lewis L. Snyder : *The Weimar Constitution*, p. 42 et seq.

88. *Commentaries on the Constitution of the United States* (1833) Vol. II, p. 687.

89. *Modern Constitutions*, p. 78

90. *Legislative, Executive and Judicial Process (sic) in Australia*, pp. 695-698.

over Part III of the Constitution on an erroneous view of articles 13(2) and 368.

- (iii) that the First, Fourth and Seventh Amendments being part of the Constitution by acquiescence for a long time, cannot now be challenged and they contain authority for the Seventeenth Amendment;
- (iv) that this Court having now laid down that Fundamental Rights cannot be abridged or taken away by the exercise of amendatory process in article 368, any further inroad into these rights as they exist today will be illegal and unconstitutional unless it complies with Part III in general and article 13(2) in particular.
- (v) that for abridging or taking away fundamental rights, a Constituent body will have to be convoked; and
- (vi) that the two impugned Acts, namely, the Punjab Security of Land Tenures Act, 1953 (X of 1953) and the Mysore Land Reforms Act, 1953 (X of 1953) as amended by Act XIV of 1955 are valid under the Constitution not because they are included in Schedule 9 of the Constitution but because they are protected by article 31-A, and the President's assent.

(196) In view of my decision the several petitions will be dismissed, but without costs. The State Acts Nos. 21-64 in the Ninth Schedule will have to be tested under Part III with such protection as articles 31 and 31-A give to them.

(197) Before parting with this case I only hope that the fundamental rights will be able to withstand the pressure of textual readings by "the depth and toughness of their roots".

**Bachawat, R. S., J.\***

(198) The constitutionality of the Constitution First, Fourth and Seventeenth Amendment Acts is challenged on the ground that the fundamental rights conferred by Part III are inviolable and immune from amendment. It is said that article 368 does not give any power of amendment and, in any event, the amending power is limited expressly by article 13(2) and impliedly by the language of article 368 and other Articles as also the preamble. It is then said that the power of amendment is abused and should be subject to restrictions. The Acts are attacked also on the ground that they made changes

\* The judgment was delivered in respect of Writ Petition Nos. 153, 202 and 205 of 1966.

in article 226 and 245 and such changes could not be made without complying with the proviso to article 368. Article 31-B is subjected to attack on several other grounds.

(199) The constitutionality of the First Amendment was upheld in *Sri Shankari Prasad Singh Deo v. Union of India* and *State of Bihar* 1952 SCR 89=(AIR 1951 SC 458), and that of the Seventeenth amendment in 1965-1 SCR 933=(AIR 1965 SC 845). The contention is that these cases were wrongly decided.

(200) Part XX of the Constitution specifically provides for its amendment. It consists of a single article. Part XX is as follows:—

**“Part XX**

**AMENDMENT OF THE CONSTITUTION**

368. *Procedure for amendment of the Constitution*—An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

- (a) article 54, article 55, article 73, article 162 or article 241, or
- (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
- (c) any of the Lists in the Seventh Schedule, or
- (d) the representation of States in Parliament, or
- (e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.”

(201) The contention that article 368 prescribes only the procedure of amendment cannot be accepted. The article not only prescribes the procedure but also gives the power of amendment. If the procedure of article 368 is followed, the Constitution ‘shall stand amended’ in accordance with the terms of the bill. It is because the power to amend is given by the article that the Constitution stands amended. The proviso is enacted on the assumption that the several articles mentioned in it

are amendable. The object of the proviso is to lay down a stricter procedure for amendment of the articles which would otherwise have been amendable under the easier procedure of the main part. There is no other provision in the Constitution under which these articles can be amended.

(202) Articles 4, 169, Fifth Schedule Part D, and Sixth Schedule Para 21 empower the Parliament to pass laws amending the provisions of the First, Fourth, Fifth and Sixth Schedules and making amendments of the Constitution consequential on the abolition or creation of the legislative councils in States, and by express provision no such law is deemed to be an amendment of the Constitution for the purposes of article 368. All other provisions of the Constitution can be amended by recourse to article 368 only. No other article confers the power of amending the Constitution.

(203) Some articles are expressed to continue until provision is made by law [see articles 59(3), 65(3), 73(2), 97, 98(3), 106, 135, 142(1), 148(3), 149, 171(2), 186, 187(3), 189(3), 194(3), 195, 221(2), 283(1) and (2), 285, 313, 345, 372(1), 373]. Some articles continue unless provision is made otherwise by law [see articles 120(2), 133(3), 210(2)] and some continue save as otherwise provided by law [see articles 239(1), 287]. Some articles are subject to the provisions of any law to be made [see articles 137, 146(2), 225, 229(2), 241(3), 300(1), 309], and some are expressed not to derogate from the power of making laws [see articles 5 to 11, 289(2)]. All these articles are transitory in nature and cease to operate when provision is made by law on the subject. None of them can be regarded as conferring the power of amendment of the Constitution. Most of these articles continue until provision is made by law made by the Parliament. But some of them continue until or unless provision is made by the State Legislature [see articles 189(3), 194(3), 195, 210(2), 229(2), 300(1), 345] or by the appropriate legislature [see articles 225, 241(3)]; these articles do not confer a power of amendment, for the State Legislature cannot amend the Constitution. Many of the above-mentioned articles and also other articles [see articles 22(7), 32(3), 33 to 35, 139, 140, 239A, 241, 245 to 250, 252, 253, 258(2), 286(2), 302, 307, 315(2), 327, 369] delegate powers of making laws to the legislature. None of these articles gives the power of amending the Constitution.

(204) It is said that article 248 and List I, Item 97 of the 7th Schedule read with article 246 give the Parliament the power of amending the Constitution. This argument does not bear scrutiny. Article 248 and List I, Item 97 vest the residual power of legislation, in the Parliament. Like other powers of legislation, the residual power of the Parliament to make laws is by virtue of article 245 subject to the provisions of the

Constitution. No law made under the residual power can derogate from the Constitution or amend it. If such a law purports to amend the Constitution, it will be void. Under the residual power of legislation, the Parliament has no power to make any law with respect to any matter enumerated in Lists II and III of the 7th Schedule but under article 368 even Lists II and III can be amended. The procedure for constitutional amendments under article 368 is different from the legislative procedure for passing laws under the residual power of legislation. If a constitutional amendment could be made by recourse to the residual power of legislation and the ordinary legislative procedure, article 368 would be meaningless. The power of amending the Constitution is to be found in article 368 and not in article 248 and List I, Item 97. Like other Constitutions, our Constitution makes express provisions for amending the Constitution.

(205) The heading of article 368 shows that it is a provision for amendment of the Constitution, the marginal note refers to the procedure for amendment and the body shows that if the procedure is followed, the Constitution shall stand amended by the power of the article.

(206) Chapter VIII of the Australian Constitution consists of a single section (S. 128). The heading is 'Alteration of the Constitution'. The marginal note is 'Mode of altering the Constitution.' The body lays down the procedure for alteration. The opening words are : "This Constitution shall not be altered except in the following manner." Nobody has doubted that the section gives the power of amending the Constitution. Wynes in his book<sup>91</sup> stated "The power of amendment extends to alteration of 'this Constitution' which includes S. 128 itself. It is true that S. 128 is negative in form, but the power is implied by the terms of the section."

(207) Article 5 of the United States Constitution provides that a proposal for amendment of the Constitution by the Congress on being ratified by three-fourth of the States "shall be valid to all intents and purposes as part of this Constitution." The accepted view is that "power to amend the Constitution was reserved by article 5", per Van Devanter, J. in *Rhode Island v. Palmer*<sup>92</sup>. Article 368 uses stronger words. On the passing of the bill for amendment under article 368, "the Constitution shall stand amended in accordance with the terms of the Bill."

(208) Article 368 gives the power of amending 'this Constitution'. This Constitution means any of the provisions of the Constitution. No limitation on the amending power can be gathered from the language of this article. Unless this power is restricted by some other provision of the Constitution, each and every part of the Constitution may be

91. *Legislative, Executive and Judicial Powers in Australia* (3rd Ed.), p. 695.

92. (1919) 253 US 350 = (64 Law Ed. 946).



amended under article 368. All the articles mentioned in the proviso are necessarily within this amending power. From time to time major amendments have been made in the articles mentioned in the proviso [see articles 80 to 82, 124 (2A), 131, 214, 217(3), 222(2), 224A, 226(1A), 230, 231, 241 and Seventh Schedule] and other articles [see articles 1, 3, 66, 71, 85, 153, 158, 170, 174, 239, 239A, 240, 258A, 269, 280, 286, 290A, 291, 298, 305, 311, 316, 350A, 350B, 371, 371A, 372A, 376, 379 to 391, the First, Third and Fourth Schedules], and minor amendments have been made in innumerable articles. No one has doubted so far that these articles are amendable. Part III is a part of the Constitution and is equally amendable.

(209) It is argued that a Constitution Amendment Act is a law and, therefore, the power of amendment given by article 368 is limited by article 13(2). Article 13(2) is in these terms :—

“13(1) .....

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.”

(210) Now article 368 gives the power of amending each and every provision of the Constitution. Article 13(2) is a part of the Constitution and is within the reach of the amending power. In other words article 13(2) is subject to the overriding power of article 368 and is controlled by it. Article 368 is not controlled by article 13(2) and the prohibitory injunction in article 13(2) is not directed against the amending power. Looked at from this broad angle, article 13(2) does not forbid the making of a constitutional amendment abridging or taking away any right conferred by Part III.

(211) Let us now view the matter from a narrower angle. The contention is that a constitutional amendment under article 368 is a law within the meaning of article 13. I am inclined to think that this narrow contention must also be rejected.

(212) In article 13 unless the context otherwise provides ‘law’ includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law [article 13(3), (a)]. The inclusive definition of law in article 13(3) (c) neither expressly excludes nor expressly includes the Constitution or a constitutional amendment.

(213) Now the term ‘law’ in its widest and generic sense includes the Constitution and a constitutional amendment. But in the Constitution this term is employed to designate an ordinary statute or legislative act in contradiction to the Constitution or a constitutional

amendment. The Constitution is the basic law providing the framework of government and creating the organs for the making of the laws. The distinction between the Constitution and the law is so fundamental that the Constitution is not regarded as a law or a legislative act. The Constitution means the Constitution as amended. An amendment made in conformity with article 368 is a part of the Constitution and is likewise not a law.

(214) The basic theory of our Constitution is that it cannot be changed by a law or legislative Act. It is because special provision is made by articles 4, 169, Fifth Schedule Part D and Sixth Schedule para. 21 that *some parts of the Constitution are amendable by ordinary laws. But by express provision no such law is deemed to be a constitutional amendment. Save as expressly provided in articles 4, 169, Fifth Schedule Part D and Sixth Schedule para 21, no law can amend the Constitution, and a law which purports to make such an amendment is void.*

(215) In *Marbury v. Madison*<sup>93</sup>, Marshall, C. J., said:

*"It is a proposition too plain to be contested, that the Constitution controls any legislative Act repugnant to it; or, that the legislature may alter the Constitution by an ordinary Act.*

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative Acts, and, like other Acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative Act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an Act of the Legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered, by this Court, as one of the fundamental principles of our society."

(216) It is because a Constitution Amendment Act can amend the Constitution and is not a law that article 368 avoids all reference to law making by the Parliament. As soon as a bill is passed in conformity with article 368 the Constitution stands amended in accordance with the terms of the bill.

93. (1803) 1 Cranch 137, 177=2 Law Ed. 60, 78.

(217) The power of amending the Constitution is not an ordinary law making power. It is to be found in article 368 and not in articles 245, 246 and 248 and the Seventh Schedule.

(218) Nor is the procedure for amending the Constitution under article 368 an ordinary law making procedure. The common feature of the amending process under article 368 and the legislative procedure is that a bill must be passed by each House of Parliament and assented to by the President. In other respects the amending process under article 368 is very different from the ordinary legislative process. A constitution amendment Act must be initiated by a bill introduced for that purpose in either House of Parliament. The bill must be passed in each House by not less than two-thirds of the members present and voting, the requisite quorum in each House being a majority of its total membership; and in cases coming under the proviso, the amendment must be ratified by the legislatures of not less than one-half of the States. Upon the bill so passed being assented to by the President, the Constitution stands amended in accordance with the terms of the bill. The ordinary legislative process is much easier. A bill initiating a law may be passed by a majority of the members present and voting at a sitting of each House or at a joint sitting of the Houses, the quorum for the meeting of either House being one-tenth of the total number of members of the House. The bill so passed on being assented to by the President becomes a law. A bill though passed by all the members of both Houses cannot take effect as Constitution Amendment Act unless it is initiated for the express purpose of amending the Constitution.

(219) The essence of a written Constitution is that it cannot be changed by an ordinary law. But most written Constitutions provide for their organic growth by constitutional amendments. The main method of constitutional amendments are (1) by the ordinary legislation but under certain restrictions, (2) by the people through a referendum, (3) by a majority of all the units of a Federal State; (4) by a special convocation<sup>94</sup>. Our Constitution has by article 368 chosen the first and a combination of the first and the third methods.

(220) The special attributes of constitutional amendment under article 368 indicate that it is not a law or legislative act. Moreover it will be seen presently that the Constitution makers could not have intended that the term 'law' in article 13(2) would include a constitutional amendment under article 368.

(221) If a constitutional amendment creating a new fundamental right and incorporating it in Part III were a law, it would not be open to

94. See C.F. Strong : *Modern Political Institutions* (5th Ed.), pp. 133-34, 146.

the Parliament by a subsequent constitutional amendment to abrogate the new fundamental right for such an amendment would be repugnant to Part III. But the conclusion is absurd for the body which created the right can surely take it away by the same process.

(222) Shri A. K. Sen relied upon a decision of the Oklahoma Supreme Court in *Riley v. Carter*<sup>95</sup> where it was held that for some purposes the Constitution of a State was one of the laws of the State. But even in America, the term 'law' does not ordinarily include the Constitution or a constitutional amendment. In this connection, I will read the following passage in *Corpus Juris Secundum*, Vol. XVI Title Constitutional Law article 1, p. 20 :

"The term 'constitution' is ordinarily employed to designate the organic law in contradiction to the term 'law' which is generally used to designate statutes or legislative enactments. Accordingly, the term 'law' under this distinction does not include a constitutional amendment. However, the term 'law' may, in accordance with the context in which it is used, comprehend or include the constitution or a constitutional provision or amendment. A statute and a constitution, although of unequal dignity, are both 'laws', and rest on the will of the people."

In our Constitution, the expression 'law' does not include either the constitution or a constitutional amendment. For all these reasons we must hold that a constitutional amendment under article 368 is not a law within the meaning of article 13(2).

(223) I find no conflict between articles 13(2) and 368. The two articles operate in different fields. Article 13(2) operates on laws; it makes no express exception regarding a constitutional amendment, because a constitutional amendment is not a law and is outside its purview. Article 368 occupies the field of constitutional amendments. It does not particularly refer to the articles in Part III and many other articles, but on its true construction it gives the power of amending each and every provision of the Constitution and necessarily takes in Part III. Moreover, article 368 gives the power of amending itself, and if express power for amending the provisions of Part III were needed, such a power could be taken by an amendment of the article.

(224) It is said that the *non-obstante* clause in article 35 shows that the article is not amendable. No one has amended article 35 and the point does not arise. Moreover, the *non-obstante* clause is to be found in articles 258 (1), 364, 369, 370 and 371-A. No one has suggested that these articles are not amendable.

(225) This next contention is that there are implied limitations on the amending power. It is said that apart from article 13(2) there are expressions in Part III which indicate that the amending power cannot touch Part III. Part III is headed 'fundamental rights'. The right to move the Supreme Court for enforcement of the rights conferred by this Part is guaranteed by article 32 and cannot be suspended except as otherwise provided for by the Constitution—[Article 32(4)]. It is said that the terms 'fundamental' and 'guarantee' indicate that the rights conferred by Part III are not amendable. The argument overlooks the dynamic character of the Constitution. While the constitution is static, it is the fundamental law of the country, the rights conferred by Part III are fundamental, the right under article 32 is guaranteed, and the principles of State policy enshrined in Part IV are fundamental in the governance of the country. But the Constitution is never at rest; it changes with the progress of time. Article 368 provides the means for the dynamic changes in the Constitution. The scale of values embodied in Parts III and IV is not immortal. Parts III and IV being parts of the Constitution are not immune from amendment under article 368.

(226) Demands for safeguards of the rights embodied in Parts III and IV may be traced to the Constitution of India Bill 1895, the Congress Resolutions between 1917 and 1919, Mrs. Beasant's Commonwealth of India Bill of 1925, the Report of the Nehru Committee set up under the Congress Resolution in 1927, the Congress Resolution of March 1931 and the Sapru Report of 1945. The American bill of rights, the Constitutions of other countries, the declaration of human rights by the United Nations and other declarations and charters gave impetus to the demand. In this background the Constituent Assembly embodied in preamble to the Constitution the resolution to secure to all citizens social, economic and political justice, liberty of thought, expression, belief, faith and worship, equality of status and opportunity and fraternity assuring the dignity of the individual and the unity of the nation and incorporated safeguards as to some human rights in Parts III and IV of the Constitution after separating them into two parts on the Irish model. Part III contains the passive obligations of the State. It enshrines the right of life, personal liberty, expression, assembly, movement, residence, vocation, property, culture and education, constitutional remedies, and protection against exploitation and obnoxious penal laws. The State shall not deny these rights save as provided in the Constitution. Part IV contains the active obligations of the State. The State shall secure a social order in which social, economic and political justice shall inform all the institutions of national life. Wealth and its source of production shall not be concentrated in the hands of the few but shall be distributed so as to subserve the common good, and there shall be adequate means

of livelihood for all and equal pay for equal work. The State shall endeavour to secure the health and strength of workers, the right to work, to education and to assistance in cases of want, just and humane conditions of work, a living wage for workers, a uniform civil code, free and compulsory education for children. The State shall take steps to organize village panchayats, promote the educational and economic interest of the weaker sections of the people, raise the level of nutrition and standard of living, improve public health, organize agricultural and animal husbandry, separate the judiciary from executive and promote international peace and security.

(227) The active obligations of the State under Part IV are not justiciable. If a law made by the State in accordance with the fundamental directives of Part IV comes in conflict with the fundamental rights embodied in Part III, the law to the extent of repugnancy is void. Soon after the Constitution came into force, it became apparent that laws for agrarian and other reforms for implementing the directives of Part IV were liable to be struck down as they infringed the provisions of Part III. From time to time constitutional amendments were proposed with the professed object of validating these laws, superseding certain judicial interpretations of the Constitution and curing defects in the original Constitution. The First, Fourth, Sixteenth and Seventeenth Amendments made important changes in the fundamental rights. The First amendment introduced cl. (4) in article 15 enabling the State to make special provisions for the benefit of the socially and educationally backward class of citizens, the scheduled castes and the scheduled tribes in derogation of articles 15 and 29(2) with a view to implement article 46 and to supersede the decision in *State of Madras v. Champakam*<sup>96</sup>, substituted a new cl. (2) in article 19 with retrospective effect chiefly with a view to bring in public order within the permissible restrictions and to supersede the decisions in *Romesh Thappar v. State of Madras*<sup>97</sup>. *Brij Bhushan v. State of Delhi*<sup>98</sup> amended cl. (6) of article 19 with a view to free state trading monopoly from the test of reasonableness and to supersede the decision in *Moti Lal v. Government of the State of Uttar Pradesh*<sup>99</sup>. Under the stress of the First amendment it is now suggested that *Champakam's case*<sup>96a</sup>, *Romesh Thappar's case*, 1950 SCR 594 : (AIR 1950 SC 124) and *Moti Lal's case*, ILR (1951) 1 All 269 : (AIR 1951 All 257 FB) were wrongly decided, and the amendments of articles 15 and 19 were in harmony with the original

96. 1951 SCR 525 : (AIR 1951 SC 226).

97. 1950 SCR 594 : (AIR 1950 SC 124).

98. 1950 SCR 605 : (AIR 1950 SC 129).

99. ILR (1951) 1 All 269 : (AIR 1951 All 257 FB).

99a. 1951 SCR 525 : (AIR 1951 SC 226).

Constitution and made no real change in it. It is to be noticed however that before the First Amendment no attempt was made to overrule these cases, and but for the amendments, these judicial interpretations of the Constitution would have continued to be the law of the land. The Zamindari Abolition Acts were the subject of bitter attack by the Zamindars. The Bihar Act though protected by clause 6 of article 31 from attack under article 31 was struck down as violative of article 14 by the Patna High Court (see the *State of Bihar v. Maharajadhiraj Sri Kameshwar Singh*<sup>100</sup>), while the Uttar Pradesh Act (see *Raja Surya Pal Singh v. The State of U.P.*<sup>101</sup>) and the Madhya Pradesh Act (see *Visweshwar Rao v. State of Madhya Pradesh*<sup>102</sup>) though upheld by the High Courts were under challenge in this Court. The First amendment therefore introduced article 31-A, 31-B and the Ninth Schedule with a view to give effect to the policy of agrarian reforms, to secure distribution of large blocks of land in the hands of the Zamindars in conformity with article 39, and to immunize specially 13 State Acts from attack under Part III. The validity of the First Amendment was upheld in *Sri Shankari Prasad Singh Deo's case*, 1952 SCR 89=(AIR 1951 SC 458). The Fourth amendment changed article 31(2) with a view to supersede the decision in *State of West Bengal v. Bela Banerjee*<sup>103</sup> and to provide that the adequacy of compensation for property compulsorily acquired would not be justiciable, inserted cl. (2A) in article 31 with a view to supersede the decisions in the *State of West Bengal v. Sobodh Gopal Bose*<sup>104</sup>, *Dwaraka Das Shrinivas v. Sholapur Spinning and Weaving Co. Ltd.*<sup>105</sup>, *Saghir Ahmad v. The State of U.P.*<sup>106</sup> and to make it clear that clauses (1) and (2) of article 31 relate to different subject matters and a deprivation of property short of transference of ownership or right to possession to the State should not be treated as compulsory acquisition of property. The Fourth Amendment also amended article 31-A with a view to protect certain laws other than agrarian laws and to give effect to the policy of fixing ceiling limits on land holdings and included seven more Acts in the Ninth Schedule. One of the Acts (Item 17) though upheld in *Jupiter General Insurance Co., v. Rajgopalan*<sup>107</sup> was the subject of criticism in *Dwarka Das's case*<sup>108</sup>. The Sixteenth amendment amended clauses (2), (3) and (4) of article 19 to enable the imposition of

100. 1952 SCR 889 : (AIR 1952 SC 252).

101. 1952 SCR 1056 : (AIR 1952 SC 252).

102. 1952 SCR 1020 : (AIR 1952 SC 252).

103. 1954 SCR 558 : (AIR 1954 SC 170).

104. 1954 SCR 587 : (AIR 1954 SC 927).

105. 1954 SCR 674 : (AIR 1954 SC 119).

106. 1954 SCR 1218 : (AIR 1954 SC 728).

107. AIR 1952 Punj 9.

108. 1954 SCR 674 at page 706 : AIR 1954 SC 119 at page 130.

reasonable restrictions in the interest of the sovereignty and integrity of India. The Seventeenth Amendment amended the definition of estate in article 31-A with a view to supersede the decisions in *Karimbil Kunhikoman v. State of Kerala*<sup>109</sup> and *A.P. Krishnaswami Naidu v. State of Madras*<sup>110</sup> and added proviso to article 31-A and included 44 more Acts in the Ninth Schedule, as some of the Acts had been struck down as unconstitutional. The validity of the Seventeenth Amendment was upheld in *Sajjan Singh's* (supra) case, 1965-1 SCR 933 : (AIR 1965 SC 845). Since 1951, numerous decisions of this Court have recognised the validity of the First, Fourth and Seventeenth Amendments. If the rights conferred by Part III cannot be abridged or taken away by constitutional amendments, all these amendments would be invalid. The Constitution makers could not have intended that the rights conferred by Part III could not be altered for giving effect to the policy of Part IV. Nor was it intended that defects in Part III could not be cured or that possible errors in judicial interpretations of Part III could not be rectified by constitutional amendments.

(228) There are other indications in the Constitution that the fundamental rights are not intended to be inviolable. Some of the articles make express provision for abridgement of some of the fundamental rights by law [see articles 16(3), 19(1) to (6), 22(3), 23(2), 25(2), 28(2), 31(4) to (6), 33, 34]. Articles 358 and 359 enable the suspension of fundamental rights during emergency. Likewise, article 368 enables amendment of the Constitution including all the provisions of Part III.

(229) It is argued that the preamble secures the liberties grouped together in Part III and as the preamble cannot be amended, Part III is not amendable. The argument overlooks that the preamble is mirrored in the entire Constitution. If the rest of the Constitution is amendable, Part III cannot stand on a higher footing. The objective of the preamble is secured not only by Part III but also by Part IV and article 368. The dynamic character of Part IV may require drastic amendments of Part III by recourse to article 368. Moreover the preamble cannot control the unambiguous language of the articles of the Constitution<sup>111</sup>, in *Re Berubari Union and Exchange of Enclaves*<sup>112</sup>. The last case decided that the Parliament can under article 368 amend article 1 of the Constitution so as to enable the cession of a part of the national territory to a foreign power. The Court brushed aside the argument that "in the transfer of the areas

109. 1962 Suple (1) SCR 829 : (AIR 1962 SC 723).

110. 1964 7 SCR 82 : (AIR 1964 SC 1515).

111. See *Wynes Legislative, Executive and Judicial Powers in Australia*, 3rd Ed., pp. 694-5.

112. 1960-3 SCR 250 at pp. 260-2, 281-2 : AIR 1960 SC 845 at p. 856.



of Berubari to Pakistan the fundamental rights of thousands of persons are involved." The case is an authority for the proposition that the Parliament can lawfully make a constitutional amendment under article 368 authorising cession of a part of the national territory and thereby destroying the fundamental rights of the citizens of the affected territory, and this power under article 368 is not limited by the preamble.

(230) It is next argued that the people of India in exercise of their sovereign power have placed the fundamental rights beyond the reach of the amending power. Reliance is placed on the following passage in the judgment of Patanjali Sastri, J. in *A. K. Gopalan v. The State of Madras* (supra) 1950 SCR 88 at p. 198 : (AIR 1950 SC 27 at p. 72):

"There can be no doubt that the people of India have, in exercise of their sovereign will as expressed in the Preamble, adopted the democratic ideal which assures to the citizen the dignity of the individual and other cherished human values as a means to the full evolution and expression of his personality, and in delegating to the Legislature, the Executive and the Judiciary their respective powers in the Constitution, reserved to themselves certain fundamental rights, so-called, I apprehend because they have been retained by the people and made paramount to the delegated powers, as in the American model."

I find nothing in the passage contrary to the view unequivocally expressed by the same learned Judge in *Sri Shankari Prasad Singh Deo's case*, 1952 SCR 89 ; (AIR 1951 SC 458) that the fundamental rights are amendable. The power to frame the Constitution was vested in the Constituent Assembly by S. 8 (1) of the Indian Independence Act 1947. The Constitution though legal in its origin was revolutionary in character and accordingly the Constituent Assembly exercised its powers of framing the Constitution in the name of the people. The objective resolution of the Assembly passed on January 22, 1947, solemnly declared that all power and authority of sovereign independent India, its constituent parts, and organs and the Government were derived from the people. The Preamble to the Constitution declares that the people of India adopt, enact and give to themselves the Constitution. In form and in substance the Constitution emanates from the people. By the Constitution the people constituted themselves into a republic. Under the republic all public power is derived from the people and is exercised by functionaries chosen either directly or indirectly by the people. The Parliament can exercise only such powers as are delegated to it under the Constitution. The people acting through the Constituent Assembly reserved for themselves certain rights and liberties and ordained that they shall not be curtailed by ordinary legislation. But the people by the same Constitution also authorised the Parliament to make amendments to the Consti-

tution. In the exercise of the amending power the Parliament has ample authority to abridge or take away the fundamental rights under Part III.

(231) It is urged that the word 'amend' imposes the limitation that an amendment must be an improvement of the Constitution. Reliance is placed on the dictum in *Livermore v. E. G. Waite*:<sup>113</sup> "On the other hand, the significance of the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." Now an attack on the eighteenth amendment of the U. S. Constitution based on this passage was brushed aside by the U. S. Supreme Court in the decision in the *National Prohibition* case<sup>114</sup>. The decision totally negated the contention that "an amendment must be confined in its scope to an alteration or improvement of that which is already contained in the Constitution and cannot change its basic structure, include new grants of power to the Federal Government nor relinquish in the State those which already have been granted to it".<sup>115</sup> I may also read a passage from *Corpus Juris Secundum*, Vol. XVI, title 'Constitutional Law', p. 26 thus: "The term 'amendment' as used in the Constitutional article giving Congress a power of proposal includes additions to, as well as corrections of, matters already treated, and there is nothing there which suggests that it is used in a restricted sense."

(232) Article 368 indicates that the term 'amend' means 'change'. The proviso is expressed to apply to amendments which seek to make any 'change' in certain articles. The main part of article 368 thus gives the power to amend or to make changes in the Constitution. A change is not necessarily an improvement. Normally the change is made with the object of making an improvement, but the experiment may fail to achieve the purpose. Even the plain dictionary meaning of the word "amend" does not support the contention that an amendment must take an improvement, see Oxford English Dictionary where the word 'amend' is defined thus: "4. to make professed improvements (in a measure before Parliament): formally to alter in detail, though practically it may be to alter its principle so as to thwart it." The 1st, 4th, 16th and 17th Amendment Acts made changes in Part III of the Constitution. All the changes are authorized by article 368.

(233) It is argued that under the amending power, the basic features of the Constitution cannot be amended. Counsel said that they could not give an exhaustive catalogue of the basic features, but sovereignty,

113. 102 Cal 118; 25 LRA 312.

114. (1919) 253 US 350: 64 Law Ed. 946, 960, 978.

115. See Cooley: *Constitutional Law*, Chapter III, Article 5, pp. 46 and 47.

the republican form of government, the federal structure and the fundamental rights were some of the features. The Seventeenth Amendment has not derogated from the sovereignty, the republican form of government and the federal structure, and the question whether they can be touched by amendment does not arise for decision. For the purposes of these cases, it is sufficient to say that the fundamental rights are within the reach of the amending power.

(234) It is said that in the course of the last 16 years there have been numerous amendments in our Constitution whereas there have been very few amendments of the American Constitution during the last 175 years. Our condition is not comparable with the American. The dynamics of the social revolution in our country may require more rapid changes. Moreover every part of our Constitution is more easily amendable than the American. Alan Gledhill in his book *'The Republic of India'*, 1951 Edition, pp. 74 and 75, said:

"The Indian Founding Fathers were less determined than were their American predecessors to impose rigidity on their Constitution..... The Indian Constitution assigns different degrees of rigidity to its different parts, but any part of it can be more easily amended than the American Constitution."

(235) It is said that the Parliament is abusing its power of amendment by making too many frequent changes. If the Parliament has the power to make the amendments, the choice of making any particular amendment must be left to it. Questions of policy cannot be debated in this Court. The possibility of abuse of a power is not the test of its existence. In *Webb v. Outrim*<sup>116</sup> Lord Hobhouse said, "if they find that on the due construction of the Act a legislative power falls within S. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or limit the range which otherwise would be open to the Dominion Parliament". With reference to the doctrine of implied prohibition against the exercise of power ascertained in accordance with ordinary rules of construction, Knox C. J., in the *Amalgamated Society of Engineers v. Adelaide Steamship Company Limited* said:<sup>117</sup> "It means the necessity of protection against the aggression of some outside and possibly hostile body. It is based on distrust, lest powers, if once conceded to the least degree, might be abused to the point of destruction. But possible abuse of powers is no reason in British law for limiting the natural force of the language creating them."

116. 1907 AC 81.

117. 129 CLR 151.

(236) The historical background in which the Constitution was framed shows that the ideas embodied in Part III were not intended to be immutable. The Constituent Assembly was composed of representatives of the provinces elected by the members of the lower houses of the provincial legislatures and representatives of the Indian States elected by electoral colleges constituted by the rules. The draft Constitution was released on February 26, 1948. While the Constitution was on the anvil, it was envisaged that future Parliaments would be elected on the basis of adult suffrage. Such a provision was later incorporated in article 326 of the Constitution. In a special article written on August 15, 1948, Sir B. N. Rau remarked:

"It seems rather illogical that a constitution should be settled by a simple majority by an assembly elected indirectly on a very limited franchise and that it should not be capable of being amended in the same way by a Parliament elected—and perhaps for the most part elected directly—by adult suffrage."<sup>118</sup>

The conditions in India were rapidly changing and the country was in a state of flux politically and economically. Sir B. N. Rau therefore recommended that the Parliament should be empowered to amend the Constitution by its ordinary law making process for at least the first five years. Earlier, para 8 of the suggestions of the Indian National Congress of May 12, 1946 and para 15 of the proposal of the Cabinet Mission of May 16, 1946 had recommended similar powers of revision by the Parliament during the initial years or at stated intervals. The Constituent Assembly did not accept these recommendations. On September 17, 1949 an amendment (No. 304) moved by Dr. Deshmukh providing for amendment of the Constitution at any time by a clear majority in each house of Parliament was negatived. The Assembly was conscious that future Parliaments elected on the basis of adult suffrage would be more representative, but they took the view that article 368 provided a sufficiently flexible machinery for amending all parts of the Constitution. The Assembly never entertained the proposal that any part of the Constitution including Part III should be beyond the reach of the amending power. As a matter of fact, Dr. Deshmukh proposed an amendment (No. 212) prohibiting any amendment of the rights with respect to property or otherwise but on September 17, 1949 he withdrew this proposal (*see* Constituent Assembly Debates, Vol. IV, pp. 1642-43).

(237) The best exposition of the Constitution is that which it has received from contemporaneous judicial decisions and enactments. We

118. B.N. Rau: *India's Constitution in the Making* (2nd Ed.), p. 394.

find a rare unanimity of view among judges and legislators from the very commencement of the Constitution that the fundamental rights are within the reach of the amending power. No one in the Parliament doubted this proposition when the Constitution First Amendment Act of 1951 was passed. It is remarkable that most of the members of this Parliament were also members of the Constituent Assembly. In *S. Krishnan and others v. The State of Madras*<sup>119</sup>, a case decided on May 7, 1951, Bose, J. said:

"My concept of a fundamental right is something which Parliament cannot touch save by an amendment of the Constitution."

In *Sri Shankari Prasad Singh Deo's* case, 1952 SCR 89=(AIR 1951 SC 458) (supra), decided on October 5, 1951, this Court expressly decided that fundamental rights could be abridged by a constitutional amendment. This view was acted upon in all the subsequent decisions and was re-affirmed in *Sajjan Singh's* case, 1965-1 SCR 933=(AIR 1965 SC 845) (supra). Two learned Judges then expressed some doubt but even they agreed with the rest of the Court in upholding the validity of the amendments.

(238) A static system of laws is the worst tyranny that any constitution can impose upon a country. An unamendable constitution means that all reform and progress are at a stand-still. If Parliament cannot amend Part III of the Constitution even by recourse to article 368, no other power can do so. There is no provision in the Constitution for calling a convention for its revision or for submission of any proposal for amendment to the referendum. Even if power to call a convention or to submit a proposal to the referendum be taken by amendment of article 368, Part III would still remain unamendable on the assumption that a constitutional amendment is a law. Not even the unanimous vote of the 500 million citizens or their representatives at a special convocation could amend Part III. The deadlock could be resolved by revolution only. Such a consequence was not intended by the framers of the Constitution. The constitution is meant to endure.

(239) It has been suggested that the Parliament may provide for another Constituent Assembly by amending the Constitution and that Assembly can amend Part III and take away or abridge the fundamental rights. Now if this proposition is correct, a suitable amendment of the Constitution may provide that the Parliament will be the Constituent Assembly and thereupon the Parliament may amend Part III. If so, I do not see why under the Constitution as it stands now, the Parliament cannot be regarded as a recreation of the Constituent Assembly for the special purpose of making constitutional amendments under article 368, and

<sup>119</sup>, 1951 SCR 621 at p. 652; AIR 1951 SC 301 at p. 312.

why the amending power cannot be regarded as a constituent power as was held in *Sri Shankari Prasad Singh Deo's* case, 1952 SCR 89: (AIR 1951 SC 458).

(240) The contention that the constitutional amendments of Part III had the effect of changing articles 226 and 245 and could not be passed without complying with the proviso to article 368 is not tenable. A constitutional amendment which does not profess to amend article 226 directly or by inserting or striking words therein cannot be regarded as seeking to make any change in it and thus falling within the constitutional inhibition of the proviso. Article 226 gives power to the High Court throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority within those territories directions, orders and writs for the enforcement of any of the rights conferred by Part III and for any other purpose. The Seventeenth Amendment made no direct change in article 226. It made changes in Part III and abridged or took away some of the rights conferred by that Part. As a result of the changes, some of those rights no longer exist and as the High Court cannot issue writs for the enforcement of those rights its power under article 226 is affected incidentally. But an alteration in the area of its territories or in the number of persons or authorities within those territories or in the number of enforceable rights under Part III or other rights incidentally affecting the power of the High Court under article 226 cannot be regarded as an amendment of that article.

(241) Article 245 empowers the Parliament and the Legislatures of the States to make laws subject to the provisions of the Constitution. This power to make laws is subject to the limitations imposed by Part III. The abridgement of the rights conferred by Part III by the Seventeenth Amendment necessarily enlarged the scope of the legislative power, and thus affected article 245 indirectly. But the Seventeenth Amendment made no direct change in article 245 and did not amend it.

(242) Article 31-B retrospectively validated the Acts mentioned in the Ninth Schedule notwithstanding any judgment, decree or order of any court though they take away or abridge the rights conferred by Part III. It is said that the Acts are still-born and cannot be validated. But by force of article 31-B the Acts are deemed never to have become void and must be regarded as valid from their inception. The power to amend the Constitution carries with it the power to make a retrospective amendment. It is said that article 31-B amends article 141 as it alters the law declared by this Court on the validity of the Acts. This argument is baseless. As the Constitution is amended retrospectively, the basis upon which the judgments of this Court were pronounced no longer exists, and the law declared by this Court can have no application.

It is said that article 31-B is a law with respect to land and other matters, within the competence of the State Legislature, and the Parliament has no power to enact such a law. The argument is based on a misconception. The Parliament has not passed any of the Acts mentioned in the Ninth Schedule. Article 31-B removed the constitutional bar on the making of the Acts. Only the Parliament could remove the bar by the Constitution amendment. It has done so by article 31-B. The Parliament could amend each article in Part III separately and provide that the Acts would be protected from attack under each article. Instead of amending each article separately, the Parliament has by article 31-B made a comprehensive amendment of all the articles by providing that the Acts shall not be deemed to be void on the ground that they are inconsistent with any of them. The Acts as they stood on the date of the Constitution Amendments are validated. By the last part of article 31-B the competent legislatures will continue to retain the power to repeal or amend the Acts. The subsequent repeals and amendments are not validated. If in future the competent legislature passes a repealing or amending Act which is inconsistent with Part III it will be void.

(243) I have, therefore, come to the conclusion that the First, Fourth, Sixteenth and Seventeenth Amendments are constitutional and are not void. If so, it is common ground that these petitions must be dismissed.

(244) For the last 16 years the validity of constitutional amendments of fundamental rights have been recognised by the people and all the organs of the government including the legislature, the judiciary and the executive. Revolutionary, social and economic changes have taken place on the strength of the First, Fourth and Seventeenth Amendments. Even if two views were possible on the question of the validity of the amendments, we should not now reverse our previous decisions and pronounce them to be invalid. Having heard lengthy arguments on the question I have come to the conclusion that the validity of the constitutional amendments was rightly upheld in *Sri Shankari Prasad Singh Deo's case*, 1952 SCR 89=(AIR 1951 SC 458) and *Sajjan Singh's case*, 1965-1 SCR 933: (AIR 1965 SC 845) and I find no reason for overruling them.

(245) The First, Fourth and Seventeenth amendment Acts are subjected to bitter attacks because they strike at the entrenched property rights. But the abolition of the zamindari was a necessary reform. It is the First Constitution Amendment Act that made this reform possible. No legal argument can restore the outmoded feudal zamindari system. What has been done cannot be undone. The battle for the past is lost. The legal argument necessarily shifts. The proposition now is that the

constitution amendment acts must be recognized to be valid in the past but they must be struck down for the future. The argument leans on the ready made American doctrine of prospective overruling.

(246) Now the First, Fourth, Sixteenth and Seventeenth Amendment Acts take away and abridge the rights conferred by Part III. If they are laws they are necessarily rendered void by article 13(2). If they are void, they do not legally exist from their very inception. They cannot be valid from 1951 to 1967 and invalid thereafter. To say that they were valid in the past and will be invalid in the future is to amend the Constitution. Such a naked power of amendment of the Constitution is not given to the Judges. The argument for the petitioners suffers from a double fallacy, the first that the Parliament has no power to amend Part III so as to abridge or take away the entrenched property rights, and the second that the Judges have the power to make such an amendment.

(247) I may add that if the First and the Fourth amendments are valid, the Seventeenth must necessarily be valid. It is not possible to say that the First and Fourth amendments though originally invalid have now been validated by acquiescence. If they infringed article 13(2), they were void from their inception. Referring to the 19th amendment of the U. S. Constitution, Brandeis, J., said in *Leser v. Garnett*:<sup>120</sup>

"This Amendment is in character and phraseology precisely similar to the 15th. For each the same method of adoption was pursued. One cannot be valid and the other invalid. That the 15th is valid, although rejected by six states, including Maryland, has been recognized and acted on for half a century.....The suggestion that the 15th was incorporated in the Constitution, not in accordance with law, but practically as a war measure, which has been validated by acquiescence, cannot be entertained."

(248) Moreover the Seventeenth amendment has been acted upon and its validity has been upheld by this Court in *Sajjan Singh's* case. If the First and the Fourth Amendments are validated by acquiescence, the Seventeenth is equally validated.

(249) Before concluding this judgment I must refer to some of the speeches made by the members of the Constituent Assembly in the course of debates on the draft constitution. These speeches cannot be used as aids for interpreting the Constitution. See *State of Travancore-Cochin and others v. The Bombay Co. Ltd.*<sup>121</sup> Accordingly, I do not rely

120. (1922) 258 US 130: 66 Law Ed. 505, 511.

121. 1952 SCR 1112: AIR 1952 SC 366.



on them as aids to construction. But I propose to refer to them, as Shri A.K. Sen relied heavily on the speeches of Dr. B.R. Ambedkar. According to him, the speeches of Dr. Ambedkar show that he did not regard the fundamental rights as amendable. This contention is not supported by the speeches. Sri Sen relied on the following passage in the speech of Dr. Ambedkar on September 17, 1949:—

“We divide the articles of the Constitution under three categories. The first category is the one which consists of articles which can be amended by Parliament by a bare majority. The second set of articles are articles which require two-thirds majority. If the future Parliament wishes to amend any particular article which is not mentioned in Part III or article 304, all that is necessary for them is to have two-thirds majority. They can amend it.

“Mr. President: Of Members present .....

“Yes. Now, we have no doubt put articles in a third category where for the purposes of amendment the mechanism is somewhat different or double. It required two-thirds majority plus ratification by the States.”<sup>122</sup> I understand this passage to mean that according to Dr. Ambedkar an amendment of the articles mentioned in Part III and 368 requires two-thirds majority plus ratification by the States. He seems to have assumed (as reported) that the provisions of Part III fall within the proviso to article 368. But he never said that Part III was not amendable. He maintained consistently that all the articles of the Constitution are amendable under article 368. On November 4, 1948, he said:

“The second means adopted to avoid rigidity and legalism is the provision for facility with which the Constitution could be amended. The provisions of the Constitution relating to the amendment of the Constitution divide the articles of the Constitution into two groups. In the one group are placed articles relating to (a) the distribution of legislative powers between the Centre and the States, (b) the representation of the States in Parliament, and (c) the powers of the Courts. All other articles are placed in another group, articles placed in the second group cover a very large part of the Constitution and can be amended by Parliament by a double majority, namely, a majority of not less than two-thirds of the members of each House present and voting and by a majority of the total membership of each House. The amendment of these articles does not require ratification by the States. It is only in those articles which are placed in group one that an additional safeguard of ratification by the States is introduced. One can therefore safely say that the Indian Federation will not suffer from

122. *Constituent Assembly Debates (C. A. Deb.)*, Vol. IX, p. 1661.

the faults of rigidity or legalism. Its distinguishing feature is that it is a flexible Federation.

"The provisions relating to amendment of the Constitution have come in for a virulent attack at the hands of the critics of the Draft Constitution. It is said that the provisions contained in the Draft make amendment difficult. It is proposed that the Constitution should be amendable by a simple majority at least for some years. The argument is subtle and ingenious. It is said that this Constituent Assembly is not elected on adult suffrage while the future Parliament will be elected on adult suffrage and yet the former has been given the right to pass the Constitution by a simple majority while the latter has been denied the same right. It is paraded as one of the absurdities of the Draft Constitution. I must repudiate the charge because it is without foundation. To know how simple are the provisions of the Draft Constitution in respect of amending the Constitution one has only to study the provisions for amendment contained in the American and Australian Constitutions. Compared to them those contained in the Draft Constitution will be found to be the simplest. The Draft Constitution has eliminated the elaborate and difficult procedures such as a decision by a convention or a referendum. The powers of amendment are left with the Legislatures, Central and Provincial. It is only for amendments of specific matters—and they are only few that the ratification of the State Legislatures is required. All other articles of the Constitution are left to be amended by Parliament. The only limitation is that it shall be done by a majority of not less than two-thirds of the members of each House present and voting and a majority of the total membership of each House. It is difficult to conceive a simpler method of amending the Constitution."<sup>123</sup>

On December 9, 1948, Dr. Ambedkar said with reference to article 32:

"The Constitution has invested the Supreme Court with these rights and these writs could not be taken away unless and until the Constitution itself is amended by means left open to the legislature."<sup>124</sup>

On November 25, 1948, Dr. Ambedkar strongly refuted the suggestion that fundamental rights should be absolute and unalterable. He said:

"The condemnation of the Constitution largely comes from two quarters, the Communist Party and the Socialist Party...The second thing that the Socialists want is that the Fundamental Rights mentioned in the Constitution must be absolute and without any limitations so that if their party

123. *Ibid.*, Vol. VII, pp. 35-6, 43-4.

124. *Ibid.*, Vol. VII, 953.

comes into power, they would have the unfettered freedom not merely to criticize, but also to overthrow the State...Jefferson, the great American statesman who played so great a part in the making of the American Constitution, has expressed some very weighty views which makers of Constitution can never afford to ignore. In one place, he has said 'We may consider each generation as a distinct nation, with a right, by the will of the majority, to bind themselves, but none to bind the succeeding generation, more than the inhabitants of another country.' In another place, he has said: 'The idea that institutions established for the use of the nation cannot be touched or modified, even to make them answer their end, because of rights gratuitously supposed in those employed to manage them in the trust for the public, may perhaps be a salutary provision against the abuses of a monarch, but is most absurd against the nation itself. Yet our lawyers and priests generally inculcate this doctrine, and suppose that preceding generations held the earth more freely than we do; had a right to impose laws on us, unalterable by ourselves, and that we, in the like manner, can make laws and impose burdens on future generations, which they will have no right to alter; in fine, that the earth belongs to the dead and not the living.' I admit that what Jefferson has said is not merely true, but is absolutely true. There can be no question about it. Had the Constituent Assembly departed from this principle laid down by Jefferson it would certainly be liable to blame, even to condemnation. But I ask, has it? Quite the contrary. One has only to examine the provision relating to the amendment of the Constitution. The Assembly has not only refrained from putting a seal of finality and infallibility upon this Constitution by denying to the people the right to amend the Constitution as in Canada or by making the amendment of the Constitution subject to the fulfilment of extraordinary terms and conditions as in America or Australia, but has provided a most facile procedure for amending the Constitution. I challenge any of the critics of the Constitution to prove that any Constituent Assembly anywhere in the world has, in the circumstances in which this country finds itself, provided such a facile procedure for the amendment of the Constitution. If those who are dissatisfied with the Constitution have only to obtain a 2/3rds majority and if they cannot obtain even a two-thirds majority in the Parliament elected on adult franchise in their favour, their dissatisfaction with the Constitution cannot be deemed to be shared by the general public."<sup>125</sup>

(250) On November 11, 1948 Pandit Jawahar Lal Nehru said:

"And remember this, that while we want this Constitution to be as solid and as permanent a structure as we can make it, nevertheless

125. *Ibid.*, Vol. II, pp. 975-6.

there is no permanence in Constitutions. There should be a certain flexibility. If you make anything rigid and permanent, you stop a nation's growth, the growth of living vital organic people. Therefore it has to be flexible."<sup>126</sup>

(251) The views of Jefferson echoed by Ambedkar and Nehru were more powerfully expressed by Thomas Paine in 1791:

"There never did, there never will, and there never can, exist a parliament, or any description of men, or any generation of men, in any country, possessed of the right or the power of binding and controlling posterity to the 'end of time', or of commanding for ever how the world shall be governed, or who shall govern it; and, therefore, all such clauses, acts or declarations by which the makers of them attempt to do what they have neither the right nor the power to do nor take power to execute, are in themselves null and void. Every age and generation must be as free to act for itself in all cases as the ages and generations which preceded it. The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has any generation a property in the generations which are to follow. The Parliament of the people of 1688 or of any other period had no more right to dispose of the people of the present day, or to bind or to control them in any shape whatever, than the parliament or the people of the present day have to dispose of, bind or control those who are to live a hundred or a thousand years hence. Every generation is, and must be, competent to all the purpose which its occasions require. It is the living, and not the dead, that are to be accommodated. When man ceases to be, his power and his wants cease with him; and having no longer any participation in the concerns of this world, he has no longer any authority in directing who shall be its governor, or how its Government shall be organized, or how administered."<sup>127</sup>

(252) For the reasons given above, I agree with Wanchoo, J., that the writ petitions must be dismissed.

(253) In the result, the writ petitions are dismissed without costs.

**Ramaswami (V.), J. :\***

(254) I have persued the judgment of my learned Brother Wanchoo, J., and I agree with his conclusion that the Constitution (Seventeenth Amendment) Act, 1964 is legally valid, but in view of the

126. *Constituent Assembly Debates*, Vol. VII, p. 322.

127. See Thomas Paine: *Rights of Man* (Unabridged edition by H. B. Donner, pp. 3 & 4).

\* The judgment was delivered in respect of Writ Petition Nos. 153, 202 and 205 of 1966.

importance of the Constitutional issues raised in this case I would prefer to state my own reasons in a separate judgment.

(255) In these petitions which have been filed under article 32 of the Constitution a common question arises for determination, *viz.*, whether the Constitution (Seventeenth Amendment) Act, 1964 which amends article 31-A and article 31-B of the Constitution is *ultra vires* and unconstitutional.

(256) The Petitioners are affected either by the Punjab Security of Land Tenures Act, 1954 (Act X of 1953) or by the Mysore Land Reforms Act (Act 10 of 1962) as amended by Act 14 of 1965 which were added to the 9th Schedule of the Constitution by the impugned Act and their contention is that the impugned Act being unconstitutional and invalid, the validity of the two acts by which they are affected cannot be saved.

(257) The impugned Act consists of three sections. The first section gives its short title. Section 2(1) added a proviso to cl. (1) of article 31-A after the existing proviso.

This proviso reads thus:

"Provided further that where any law makes any provision for the acquisition by the state of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof."

Section 2(ii) substitutes the following sub-clause for sub-cl. (a) of clause (2) of article 31-A:—

- "(a) the expression 'estate' shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include—
- (i) any *jagir*, *inam* or *muafi* or other similar grant and in the States of Madras and Kerala, and *janmam* right;
  - (ii) any land held under *ryotwari* settlement;
  - (iii) any land held or let for purposes of agriculture or for purposes ancillary thereto including waste land, forest land, land

for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans."

Section 3 amends the 9th Schedule by adding 44 entries to it.

(258) In dealing with the question about the validity of the impugned Act, it is necessary to consider the scope and effect of the provisions contained in article 368 of the Constitution, because the main controversy in the present applications turns upon the decision of the question as to what is the construction of that article. Article 368 reads as follows:

"An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

- (a) Article 54, article 55, article 73, article 162 or article 241, or
- (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
- (c) any of the Lists in the Seventh Schedule, or
- (d) the representation of States in Parliament, or
- (e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent."

It is necessary at this stage to set out briefly the history of articles 31-A and 31-B. These articles were added to the Constitution with retrospective effect by S. 4 of the Constitution (First Amendment) Act, 1951. Soon after the promulgation of the Constitution, the political party in power, commanding as it did a majority of votes in the several State legislatures as well as in Parliament carried out radical measures of agrarian reform in Bihar, Uttar Pradesh and Madhya Pradesh by enacting legislation which may be referred to as Zamindari Abolition Acts. Certain Zamindars, feeling themselves aggrieved, attacked the validity of those Acts in courts of law on the ground that they contravened the fundamental rights conferred on them

by Part III of the Constitution. The High Court of Patna held that the Act passed in Bihar was unconstitutional while the High Courts of Allahabad and Nagpur upheld the validity of the corresponding legislation in Uttar Pradesh and Madhya Pradesh respectively (See *Kameshwar Singh v. State of Bihar*<sup>128</sup> and *Surya Pal v. U. P. Government*.<sup>129</sup> The parties aggrieved by these respective decisions had filed appeals by special leave before this Court. At the same time, petitions had also been preferred before this court under article 32 by certain other Zamindars, seeking the determination of the same issues. It was at this stage that the Union Government, with a view to put an end to all this litigation and to remedy what they considered to be certain defects brought to light in the working of the Constitution, brought forward a bill to amend the Constitution, which, after undergoing amendments in various particulars, was passed by the requisite majority as the Constitution (First Amendment) Act, 1951, by which articles 31-A and 31-B were added to the Constitution. That was the first step taken by Parliament to assist the process of legislation to bring about agrarian reform by introducing articles 31-A and 31-B. The second step in the same direction was taken by Parliament in 1955 by amending article 31-A by the Constitution (Fourth Amendment) Act, 1955. The object of this amendment was to widen the scope of agrarian reform and to confer on the legislative measures adopted in that behalf immunity from a possible attack that they contravened the fundamental rights of citizens. In other words, the amendment protected the legislative measures in respect of certain other items of agrarian and social welfare legislation, which affected the proprietary rights of certain citizens. At the time when the first amendment was made, article 31-B expressly provided that none of the Acts and Regulations specified in the 9th Schedule, nor any of the provisions thereof, shall be deemed to be void or ever to have become void on the ground that they were inconsistent with or took away or abridged any of the rights conferred by Part III, and it added that notwithstanding any judgment, decree or order of any Court or tribunal to the contrary, each of the said Acts and Regulations shall subject to the power of any competent legislature to repeal or amend, continue in force. At this time, 19 Acts were listed in Schedule 9, and they were thus effectively validated. One more Act was added to this list by the Amendment Act. of 1955, so that as a result of the second amendment, the Schedule contained 20 Acts which were validated.

(259) It appears that notwithstanding these amendments, certain other legislative measures adopted by different States for the purpose of

128. AIR 1951 Pat. 91.

129. AIR 1951 All. 674.

giving effect to the agrarian policy of the party in power, were effectively challenged. For instance, in *Karimbil Kunhikoman v. State of Kerala*<sup>130</sup> the validity of the Kerala Agrarian Relations Act (IV of 1961) was challenged by writ petitions filed under article 32, and as a result of the majority decision of this Court, the whole Act was struck down. The decision of this Court was pronounced on December 5, 1961. In *A.P. Krishnaswami Naidu etc. v. The State of Madras*<sup>131</sup>, the constitutionality of the Madras Land Reforms (Fixation of ceiling on Land) Act (No. 58 of 1961) was the subject-matter of debate, and by the decision of this Court pronounced on March 9, 1964, it was declared that the whole Act was invalid. It appears that the Rajasthan Tenancy Act, 3 of 1955 and the Maharashtra Agricultural Lands (Ceiling and Holdings) Act, 27 of 1961 had been similarly declared invalid, and in consequence, Parliament thought it necessary to make a further amendment in article 31-B so as to save the validity of these Acts which had been struck down and of other similar Acts which were likely to be challenged. With that object in view, the impugned Act has enacted S. 3 by which 44 Acts have been added to Schedule 9. It is, therefore, clear that the object of the First, Fourth and the Seventeenth Amendments of the Constitution was to help the State Legislatures to give effect to measures of agrarian reform in a broad and comprehensive sense in the interests of a very large section of Indian citizens whose social and economic welfare closely depends on the pursuit of progressive agrarian policy.

(260) The first question presented for determination in this case is whether the impugned Act, in so far as it purports to take away or abridge any of the fundamental rights conferred by Part III of the Constitution, falls within the prohibition of article 13(2) which provides that "the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall to the extent of contravention be void." In other words, the argument of petitioners was that the law to which article 13(2), applies, would include a law passed by Parliament by virtue of its constituent power to amend the Constitution, and so, its validity will have to be tested by article 13(2) itself. It was contended that 'the State' includes Parliament within article 12 and 'law' must include a constitutional amendment. It was said that it was the deliberate intention of the framers of the Constitution, who realised the sanctity of the fundamental rights conferred by Part III, to make them immune from interference not only by ordinary laws passed by the legislatures in the country but also from constitutional amendments. In my opinion, there is no substance in this

130. 1962 Suppl. (1) 829 = (AIR 1962 SC 723).

131. 1964-7 SCR 82 = AIR 1964 SC 1515.



argument. Although 'law' must ordinarily include constitutional law, there is a juristic distinction between ordinary law made in exercise of legislative power and constitutional law which is made in exercise of constituent power. In a written federal form of constitution there is clear and well known distinction between the law of the Constitution and ordinary law made by the legislature on the basis of separation of powers and pursuant to the power of law-making conferred by the Constitution (See Dicey on 'Law of the Constitution', Tenth Edn, p. 110, Jennings 'Law and the Constitution,' pp. 62-64, and 'American Jurisprudence', 2nd Edn, Vol. 16, p. 181). In such a written Constitution, the amendment of the Constitution is a substantive, constituent act which is made in the exercise of the sovereign power which created the Constitution and which is effected by a special means, namely, by a predesigned fundamental procedure unconnected with ordinary legislation. The amending power under article 368 is hence *sui generis* and cannot be compared to the law making power of Parliament pursuant to article 246 read with Lists I and III. It follows that the expression 'law' in article 13(2) of the Constitution cannot be construed as including an amendment of the Constitution which is achieved by Parliament in exercise of its sovereign constituent power, but must mean law made by Parliament in its legislative capacity pursuant to the powers of law-making given by the Constitution itself under article 246 read with Lists I and III of the 7th Schedule. It is also clear, on the same line of reasoning, that 'law' in article 13(2) cannot be construed so as to include 'law' made by Parliament under articles 4, 169, 392, 5th Schedule, Part D and 6th Schedule, para 21. The amending power of Parliament exercised under these articles stands on the same pedestal as the constitutional amendment made under article 368 so far as article 13(2) is concerned and does not fall within the definition of 'law' within the meaning of this last article.

(261) It is necessary to add that the definition of 'law' in article 13(3) does not include in terms a constitutional amendment, though it includes "any Ordinance, order, bye-law, rule, regulation, notification, custom or usage". It should be noticed that the language of article 368 is perfectly general and empowers Parliament to amend the Constitution without any exception whatsoever. Had it been intended by the Constitution-makers that the fundamental rights guaranteed under Part III should be completely outside the scope of article 368, it is reasonable to assume that they would have made an express provision to that effect. It was stressed by the petitioners during the course of the argument that Part III is headed as 'fundamental rights' and that article 32 'guarantees' the right to move Supreme Court by appropriate proceedings for enforcement of rights conferred by Part III. But the expression 'fundamental' in the phrase 'fundamental rights' means that such rights are funda-

mental *vis-à-vis* the laws of the legislatures and the acts of the executive authorities mentioned in article 12. It cannot be suggested that the expression 'fundamental' lifts the fundamental rights above the constitution itself. Similarly, the expression 'guaranteed' in articles 32(1) and 32(4) means that the right to move the Supreme Court for enforcement of fundamental rights without exhausting the normal channels through the High Courts or the lower courts is guaranteed. This expression also does not place the fundamental rights above the Constitution.

(262) I proceed to consider the next question arising in this case, *viz.*, the scope of the amending power under article 368 of the Constitution. It is contended on behalf of the petitioners that article 368 merely lays down the procedure for amendment and does not vest the amending power as such in any agency constituted under that article. I am unable to accept this argument as correct. Part XX of the Constitution which contains only article 368 is described as a Part dealing with the Amendment of the Constitution; and article 368 which prescribes the procedure for amendment of the Constitution, begins by saying that an amendment of this Constitution may be initiated in the manner therein indicated. In my opinion, the expression 'amendment of the Constitution' in article 368 plainly and unambiguously means amendment of all the provisions of the Constitution. It is unreasonable to suggest that what article 368 provides is only the mechanics of the procedure to be followed in amending the Constitution without indicating which provisions of the Constitution can be amended and which cannot. Such a restrictive construction of the substantive part of article 368 would be clearly untenable. The significant fact that a separate Part has been devoted in the Constitution for 'amendment of the Constitution' and there is only one article in that Part shows that both the power to amend and the procedure to amend are enacted in article 368. Again, the words "the Constitution shall stand amended in accordance with the terms of the bill" in article 368 clearly contemplate and provide for the power to amend after the requisite procedure has been followed. Besides, the words used in the proviso unambiguously indicate that the substantive part of the article applies to all the provisions of the Constitution. It is on that basic assumption that the proviso prescribes a specific procedure in respect of the amendment of the articles mentioned in Clauses (a) to (e) thereof. Therefore, it must be held that when article 368 confers on Parliament the right to amend the Constitution the power in question can be exercised over all the provisions of the Constitution. How the power should be exercised, has to be determined by reference to the question as to whether the proposed amendment falls under the substantive part of article 368, or whether it attracts the procedure contained in the proviso.

(263) It was suggested for the petitioners that the power of amendment is to be found in articles 246 and 248 of the Constitution read with item 97 of List I of the 7th Schedule. I do not think that it is possible to accept this argument. Article 246 states that Parliament has exclusive power to make laws with respect to matters enumerated in List I in the Seventh Schedule, and article 248, similarly, confers power on Parliament to make any law with respect to any matter not enumerated in the Concurrent List or State List. But the power of law-making in articles 246 and 248 is subject to the provision of this Constitution. "It is apparent that the power of constitutional amendment cannot fall within these articles, because it is illogical and a contradiction in terms to say that the amending power can be exercised and at the same time it is subject to the provisions of the Constitution."

(264) It was then submitted on behalf of the petitioners that the amending power under article 368 is subject to the doctrine of implied limitations. In other words, it was contended that even if article 368 confers the power of amendment, it was not a general but restricted power confined only to the amendable provisions of the Constitution, the amendability of such provisions being determined by the nature and character of the respective provision. It was argued, for instance, that the amending power cannot be used to abolish the compact of the Union or to destroy the democratic character of the Constitution guaranteeing individual and minority rights. It was said that the Constitution was a permanent compact of the States, that the federal character of the States was indissoluble, and that the existence of any of the States as part of the federal compact cannot be put an end to by the power of amendment. It was also said that the chapter of fundamental rights of the Constitution cannot be the subject-matter of any amendment under article 368. It was contended that the preamble to the Constitution declaring that India was a sovereign democratic republic was beyond the scope of the amending power. It was suggested that other basic features of the Constitution were the articles relating to distribution of legislative powers, the Parliamentary form of Government and the establishment of Supreme Court and the High Courts in the various States. I am unable to accept this argument as correct. If the Constitution-makers considered that there were certain basic features of the Constitution which were permanent it is most unlikely that they should not have expressly said in article 368 that these basic features were not amendable. On the contrary, the Constitution-makers have expressly provided that article 368 itself should be amendable by the process indicated in the proviso to that article. This circumstance is significant and suggests that all the articles of the Constitution are amendable either under the proviso to article 368 or under the main part of that article. In my opinion, there is no room for an implicator

in the construction of article 368. So far as the federal character of the Constitution is concerned, it was held by this Court in *State of West Bengal v. Union of India*<sup>132</sup> that the federal structure is not an essential part of our Constitution and there is no compact between the States and there is no dual citizenship in India. It was pointed out in that case that there was no constitutional guarantee against the alteration of boundaries of the States. By article 3 the Parliament is by law authorised to form a new State by redistribution of the territory of a State or by uniting two or more States or parts of States or by uniting any territory to a part of any State, to increase the area of any State, to diminish the area of any State, to alter the boundaries of any State, and to alter the name of any State. In *Re: The Berubari Union and Exchange of Enclaves*<sup>133</sup> it was argued that the Indo-Pakistan agreement with regard to Berubari could not be implemented even by legislation under article 368 because of the limitation imposed by the preamble to the Constitution and that such an agreement could not be implemented by a referendum. The argument was rejected by this Court and it was held that the preamble could not, in any way, limit the power of Parliament to cede parts of the national territory. On behalf of the petitioners the argument was stressed that the chapter on fundamental rights was the basic feature of the Constitution and cannot be the subject of the amending power under article 368. It was argued that the freedoms of democratic life are secured by the chapter on fundamental rights and the dignity of the individual cannot be preserved if any of the fundamental rights is altered or diminished. It is not possible to accept this argument as correct. The concepts of liberty and equality are changing and dynamic and hence the notion of permanency or immutability cannot be attached to any of the fundamental rights. The Directive Principles of Part IV are as fundamental as the constitutional rights embodied in Part III and article 37 imposes a constitutional duty upon the States to apply these principles in making laws. Reference should in particular be made to article 39(b) which enjoins upon the State to direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. Article 31 imposes a duty upon the State to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life. I have already said that the language of article 368 is clear and unambiguous in support of the view that there is no implied limitation on the amending power. In principle also it appears unreasonable to suggest that the Constitution-makers wanted

132. 1964-1 SCR 371 at p. 403 AIR 1963 SC 1241 at p. 1255.

133. (1960) 3 SCR 250—AIR 1960 SC 845.

to provide that the fundamental rights guaranteed by the Constitution should never be touched by way of amendment. In modern democratic thought there are two main trends—the liberal idea of individual rights protecting the individual and the democratic idea proper proclaiming the equality of rights and popular sovereignty. The gradual extension of the idea of equality from political to economic and social fields in the modern State has led to the problems of social security, economic planning and industrial welfare legislation. The implementation and harmonisation of these somewhat conflicting principles is a dynamic task. The adjustment between freedom and compulsion, between the rights of individuals and the social interest and welfare must necessarily be a matter for changing needs and conditions. The proper approach is, therefore, to look upon the fundamental rights of the individual as conditioned by the social responsibility, by the necessities of the Society, by the balancing of interests and not as pre-ordained and untouchable private rights.

(265) As pointed out forcefully by Laski:

“The struggle for freedom is largely transferred from the plane of political to that of economic rights. Men become less interested in the abstract fragment of political power an individual can secure than in the use of massed pressure of the groups to which they belong to secure an increasing share of the social product. Individualism gives way before socialism. The roots of liberty are held to be in the ownership and control of the instruments of production by the state, latter using its power to distribute the results of its regulation with increasing approximation to equality. So long as there is inequality, it is argued, there cannot be liberty.

The historic inevitability of this evolution was seen a century ago by de Tocqueville. It is interesting to compare his insistence that the democratization of political power meant equality and that its absence would be regarded by the masses as oppression with the argument of Lord Acton that liberty and equality are antitheses. To the latter liberty was essentially an autocratic ideal; democracy *destroyed individuality*, which was the very pith of liberty, by seeking identity of conditions. The modern emphasis is rather toward the principle that material equality is growing inescapable and that the affirmation of personality must be effective upon an immaterial plane. It is found that doing as one likes, subject only to the demands of peace, is incompatible with either international or municipal necessities. We pass from *contract to relation*, as we have passed from status to contract. Men are so involved in intricate networks of relations that the place for their liberty is in a sphere

where their behaviour does not impinge upon that self-affirmation of others which is liberty."<sup>134</sup>

(266) It must not be forgotten that the fundamental right guaranteed by article 31, for instance, is not absolute. It should be noticed that cl. (4) of that article provides an exception to the requirements of cl (2). Clause (4) relates to Bills of a State Legislature relating to public acquisition which were pending at the commencement of the Constitution. If such a Bill has been passed and assented to by the President, the Courts shall have no jurisdiction to question the validity of such law on the ground of contravention of cl.(2), *i.e.*, on the ground that it does not provide for compensation or that it has been enacted without a public purpose. Clause (6) of the article is another exception to cl. (2) and provides for ouster of jurisdiction of the Courts. While cl.(4) relates to Bills pending in the State Legislature at the commencement of the Constitution, cl. (6) relates to Bills enacted by the State within 18 months before commencement of the Constitution *i.e.*, Acts providing for public acquisition which were enacted not earlier than July 26, 1948. If the President certifies such an Act within 3 months from the commencement of the Constitution, the Courts shall have no jurisdiction to invalidate that Act on the ground of contravention of cl.(2) of that article. Similarly, the scheme of article 19 indicates that the fundamental rights guaranteed by sub-cl. (a) to (g) of cl. (1) can be validly regulated in the light of the provisions contained in cls. (2) to (6) of article 19. In other words, the scheme of article 19 is two-fold; the fundamental rights of the citizens are of paramount importance, but even the said fundamental rights can be regulated to serve the interests of the general public or other objects mentioned respectively in cls. (2) to (6) of article 19. It is right to state that the purposes for which fundamental rights can be regulated which are specified in cls.(2) to (6), could not have been assumed by the Constitution-makers to be static and incapable of expansion. It cannot be assumed that the Constitution-makers intended to forge a political straight jacket for generations to come. The Constitution-makers must have anticipated that in dealing with socio-economic problems which the legislatures may have to face from time to time, the concepts of public interest and other important considerations which are the basis of cls. (2) to (6), may change and may even expand. As Holmes, J. has said "the Constitution is an experiment, as all life is an experiment."<sup>135</sup> It is, therefore, legitimate to assume that the Constitution-makers intended that Parliament should be competent to make amendments in these rights so as to meet the challenge of the problems which may arise in the course

134. See *Encyclopaedia of Social Sciences*, Vol. IX, 445.

135. See *Abrahams v. United States*, (1918) 250 US 616 at p. 630.

of socio-economic progress and development of the country. I find it, therefore, difficult to accept the argument of the petitioners that the Constitution-makers contemplated that fundamental rights enshrined in Part III were finally and immutably settled and determined once and for all and these rights are beyond the ambit of any future amendment. Today at a time when absolutes are discredited, it must not be too readily assumed that there are basic features of the Constitution which shackle the amending power and which take precedence over the general welfare of the nation and the need for agrarian and social reform.

(267) In construing article 368 it is moreover essential to remember the nature and subject-matter of that article and to interpret it *subjectae materies*. The power of amendment is in point of quality an adjunct of sovereignty. It is in truth the exercise of the highest sovereign power in the State. If the amending power is an adjunct of sovereignty it does not admit of any limitations. This view is expressed by Dicey in 'Law of the Constitution,' 10th Edn., at page 148 as follows:

"Hence the power of amending the constitution has been placed, so to speak, outside the constitution, and that the legal sovereignty of the United States resides in the States' governments as forming one aggregate body represented by three-fourths of the several States at any time belonging to the Union."

(268) A similar view is stated by Lord Bryce.<sup>136</sup> Lester Bernhardt Ofield states as follows in his book:<sup>137</sup>

"In the last analysis, one is brought to the conclusion that sovereignty in the United States, if it can be said to exist at all, is located in the amending body. The amending body has often been referred to as the sovereign, because it meets the test of the location of sovereignty. As Willoughby has said:

"In all those cases in which, owing to the distribution of governing power, there is doubt as to the political body in which the sovereignty rests, the test to be applied is the determination of which authority has, in the last instance, the legal power to determine its own competence as well as that of others."

Applying the criteria of sovereignty which were laid down at the beginning of this chapter, the amending body is sovereign as a matter of both law and fact. Article Five expressly creates the amending body. Yet in a certain manner of speaking the amending body may be said to exist as a matter of fact since it could proceed to alter Article Five or

136. Bryce : *The American Commonwealth*, Vol. I, Ch. XXXII, p. 366.

137. Lester Bernhardt Ofield : *The Amending of the Federal Constitution*.

any other part of the Constitution. While it is true that the sovereign cannot act otherwise than in compliance with law, it is equally true that it creates the law in accordance with which it is to act."

In his book<sup>133</sup> Hugh Evander Willis says that the doctrine of amendability of the Constitution is based on the doctrine of the sovereignty of the people and that it has no such implied limitations as that an amendment shall not contain a new grant of power nor be in the form of legislation; nor change 'our dual form of government nor change the protection of the Bill of Rights, nor make any other change in the Constitution'. James G. Randall also enunciates the proposition that when a Constitutional amendment is adopted 'it is done not by the 'general government', but by the Supreme sovereign power of the nation, *i.e.*, the people acting through State legislatures or 'State Conventions' and that "the amending power is equivalent to the constitution-making power and is wholly authority of the Federal Government".<sup>139</sup> The legal position is summarised by Burdick of the American Constitution in his treatise<sup>140</sup> as follows:

"The result of the National Prohibition Cases, (1919) (253 US 350) seems to be that there is no limit to the power to amend the Constitution, except that state may not without its consent be deprived of its equal suffrage in the Senate. To put the case most extremely, this means that by action of two-thirds of both Houses of Congress and of the Legislatures in three-fourths of the States all of the powers of the national government could be surrendered to the States, or all of the reserved powers of the States could be transferred to the federal government. It is only public opinion acting upon these agencies which places any check upon the amending power. But the alternative to this result would be to recognize the power of the Supreme Court to veto the will of the people expressed in a constitutional amendment without any possibility of the reversal of the court's action except through revolution."

(269) The matter has been clearly put by George Vedel<sup>141</sup> as follows :

"Truly speaking no constitution prohibits for ever its amendment or its amendment in all its aspects.

133. H. E. Willis : *Constitutional Law of the United States*.

139. G. Randall : *Constitutional Problems Under Lincoln*, p. 395.

140. Burdick : *Law of the American Constitution*, p. 48.

141. George Vedel : *Manuel Elementaire De Droit Constitutionnel* (Recueil Sirey), p. 117.



But it can prohibit for example, the amendment (revision) during a certain time (the constitution of 1791) or it can prohibit the amendment (revision) of this or that point (as in the Constitution of 1875) which prohibits amendment of the republican form of Government and the present Constitution follows the same rule.

But this prohibition has only a political but no juridical value. In truth from the juridical view point a declaration of absolute constitutional immutability cannot be imagined. The Constituent power being the supreme power in the state cannot be fettered, even by itself. For example, article 95 of our Constitution stipulates, "The republican form of Government cannot be the subject of a proposal for amendment."

But juridically the obstacle which this provision puts in the way of an amendment of the republican form of government can be lifted as follows:

It is enough to abrogate by way of amendment (revision) the article 95 cited above. After this, the obstacle being removed, a second amendment can (deal with the republican form of Government).

In practice, this corresponds to the idea that the constituent assembly of today cannot bind the nation of tomorrow.

In *Re : The Berubari Union and Exchange of Enclaves*<sup>142</sup> (supra) the argument of implied limitation was advanced by N. C. Chatterji and it was contended that item No. 3 of the Indo-Pakistan Agreement providing for a division of Berubari Union between India and Pakistan was outside the power of constitutional amendment and that the preamble to the Constitution did not permit the dismemberment of India but preserved the integrity of the territory of India. The argument was rejected by this court and it was held that Parliament acting under article 368 can make a law to give effect to and implement the Agreement in question or to pass a law amending article 3 so as to cover cases of cession of the territory of India and thereafter make a law under the amended article 3 to implement the Agreement.

(270) There is also another aspect of the matter to be taken into account. If the fundamental rights are unamendable and if article 368 does not include any such power it follows that the amendment of, say, article 31 by insertion of articles 31-A and 31-B can only be made by a violent revolution. It was suggested for the petitioners that an alteration

142. 1960-3 SCR 250=AIR 1960 SC 845.

of fundamental rights could be made by convening a new Constituent Assembly outside the frame-work of the present Constitution, but it is doubtful if the proceedings of the new Constituent Assembly will have any legal validity, for the reason is that if the Constitution provides its own method of amendment, any other method of amendment of the Constitution will be unconstitutional and void. For instance, in *George S. Hawke v. Harvey C. Smith as Secretary of State of Ohio*<sup>143</sup> it was held by the Supreme Court of U.S.A. that referendum provisions of State Constitutions and statutes cannot be applied in the ratification or rejection of amendments to the Federal Constitution without violating the requirements of article 5 of such Constitution and that such ratification shall be by the legislatures of the several states or by conventions therein, as Congress shall decide. It was held in that case that the injunction was properly issued against the calling of a referendum election on the act of the legislature of a state ratifying an amendment to the Federal Constitution. If, therefore, the petitioners are right in their contention that article 31 is not amendable within the frame-work of the present Constitution, the only other recourse for making the amendment would, as I have already said, be by revolution and not through peaceful means. It cannot be reasonably supposed that the Constitution-makers contemplated that article 31 or any other article on fundamental rights should be altered by a violent revolution and not by peaceful change. It was observed in *Feigenspan v. Bodine*.<sup>144</sup>

"If the plaintiff is right in its contention of lack of power to insert the Eighteenth Amendment into the United States Constitution because of its subject-matter, it follows that there is no way to incorporate it and others of like character into the national organic law, except through revolution. This, the plaintiff concedes, is the inevitable conclusion of its contention. This is so startling a proposition that the judicial mind may be pardoned for not readily acceding to it, and for insisting that only the most convincing reasons will justify its acceptance."

I am, therefore, of the opinion that the petitioners are unable to make good their argument on this aspect of the case.

(271) It was then contended for the petitioners that there would be anomalies if article 368 is interpreted to have no implied limitations. It was said that the more important articles of the Constitution can be amended by the procedure mentioned in the substantive part of article 368 but the less important articles would require ratification by the legis-

143. (1919) 64 Law Ed. 871.

144. 261 Fed. 186.

latures of not less than half of the States under the proviso to that article. It was argued that the fundamental rights and also article 32 could be amended by the majority of two-thirds of the members of Parliament but article 226 cannot be amended unless there was ratification of the legislatures of not less than half of the States. It was pointed out that articles 54 and 55 were more difficult to amend but not article 52. Similarly, article 162 required ratification of the States but not article 163 which related to the Council of Ministers to aid and advise the Governor in the exercise of his functions. In my opinion the argument proceed on a misconception. The scheme of article 368 is not to divide the Articles of the Constitution into two categories, viz., important and not so important articles. It was contemplated by the Constitution-makers that the amending power in the main part of article 368 should extend to each and every article of the Constitution but in the case of such articles which related to the federal principle or the relation of the States with the Union, the ratification of the legislatures of at least half the States should be obtained for any amendment. It was also contended that if article 368 was construed without any implied limitation the amending power under that article could be used for subverting the Constitution. Both Mr. Asoke Sen and Mr. Palkhiwala resorted to the method of *reductio ad absurdum* in pointing out the abuses that might occur if there were no limitations on the power to amend. It was suggested that Parliament may, by a constitutional amendment, abolish the parliamentary system of government or repeal the chapter of fundamental rights or divide India into two States, or even reintroduce the rule of a monarch. It is inconceivable that Parliament should utilise the amending power for bringing about any of these contingencies. It is, however, not permissible, in the first place, to assume that in a matter of constitutional amendment there will be abuse of power and then utilise it as a test for finding out the scope of the amending power. This court has declared repeatedly that the possibility of abuse is not to be used as a test of the existence or extent of a legal power<sup>145</sup> [See for example, *State of West Bengal v. Union of India*, *op. cit.*, p. 407]. In the second place, the amending power is a power of an altogether different kind from the ordinary governmental power and if an abuse occurs, it occurs at the hands of Parliament and the State Legislatures representing an extra-ordinary majority of the people, so that for all practical purposes it may be said to be the people, or at least the highest agent of the people, and one exercising sovereign powers. It is therefore anomalous to speak of 'abuse' of a power of this description. In the last analysis, political machinery and artificial limitations will not protect the people

145. 1964-1 SCR 371 at p. 407 AIR 1962 SC 1241 at p. 1251.

from themselves. The perpetuity of our democratic institutions will depend not upon special mechanisms or devices, nor even upon any particular legislation, but rather upon the character and intelligence and the good conscience of our people themselves. As observed by Frankfurter, J. in *American Federation of Labour v. American Sash & Door Co.*<sup>146</sup>

"But a democracy need not rely on the courts to save it from its own unwisdom. If it is alert—and without alertness by the people there can be no enduring democracy—unwise or unfair legislation can readily be removed from the statute books. It is by such vigilance over its representatives that democracy proves itself."

(272) I pass on to consider the next objection of the petitioners that the true purpose and object of the impugned Act was to legislate in respect of land and that legislation in respect of land falls within the jurisdiction of State legislatures under Entry 18 of List II, and the argument was that since the State Legislatures alone can make laws in respect of land, Parliament had no right to pass the impugned Act. The argument was based on the assumption that the impugned Act purports to be, and in fact is, a piece of land legislation. It was urged that the scheme of articles 245 and 246 of the Constitution clearly shows that Parliament has no right to make a law in respect of land, and since the impugned Act is a legislative measure in relation to land, it is invalid. In my opinion, the argument is based upon a misconception. What the impugned Act purports to do is not to make any land legislation but to protect and validate the legislative measures in respect of agrarian reforms passed by the different State Legislatures in the country by granting them immunity from attack based on the plea that they contravene fundamental rights. The impugned Act was passed by Parliament in exercise of the amending power conferred by article 368 and it is impossible to accept the argument that the constitutional power of amendment can be fettered by articles 245 and 246 or by the legislative Lists. It was argued for the petitioners that Parliament cannot validate a law which it has no power to enact. The proposition holds good where the validity of an impugned Act turns on whether the subject-matter falls within or without the jurisdiction of the legislature which passed it. But to make a law which contravenes the Constitution constitutionally valid is a matter of constitutional amendment, and as such it falls within the exclusive power of Parliament and within the amending power conferred by article 368. I am accordingly of the opinion that the petitioners are unable to substantiate their argument on this aspect of the case. I should like to add that in *Leser v. Garnett*<sup>147</sup> in *National*

146. (1948) 335 US 538, p. 556.

147. (1922) 258 US 130.

*Prohibition Cases*<sup>148</sup> and in *United States v. Sprague*<sup>149</sup> a similar argument was advanced to the effect that a constitutional amendment was not valid if it was in the form of legislation. But the argument was rejected by the Supreme Court of U.S.A. in all the three cases.

(273) *It remains to deal with the objection of the petitioners that the newly inserted articles 31-A and 31-B require ratification of the State Legislatures under the proviso to article 368 of the Constitution because these articles deprive the High Courts of the power to issue appropriate writs under article 226 of the Constitution. I do not think there is any substance in this argument. The impugned Act does not purport to change the provisions of article 226 and it cannot be said even to have that effect directly or in any substantial measure. It is manifest that the newly inserted articles do not either in terms or in effect seek to make any change in article 226 of the Constitution. Article 31-A aims at saving laws providing for the compulsory acquisition by the State of a certain kind of property from the operation of article 13 read with other relevant articles in Part III, while article 31-B purports to validate certain specified Acts and Regulations already passed, which, but for such a provision, would be liable to be impugned under article 13. It is therefore not correct to say that the powers of High Courts to issue writs is, in any way, affected. The jurisdiction of the High Courts remains just the same as it was before. Only a certain category of cases has been excluded from the purview of Part III and the High Courts can no longer intervene, not because their jurisdiction or powers have been curtailed in any manner or to any extent, but because there would be no occasion thereafter for the exercise of their power in such cases. As I have already said, the effect of the impugned Act on the jurisdiction of High Courts under article 226 of the Constitution is not direct but only incidental in character and therefore the contention of the petitioners on this point against the validity of the impugned Act must be rejected.*

(274) *It is well settled that in examining a constitutional question of this character, it is legitimate to consider whether the impugned legislation is a legislation directly in respect of the subject-matter covered by any particular article of the Constitution or whether it touches the said article only incidentally or indirectly. In A. K. Gopalan v. The State of Madras*<sup>150</sup> (supra) Kania, C. J. had occasion to consider the validity of the argument that the preventive detention order resulted in the detention of the applicant in a cell, and so, it contravened his funda-

148 (1919) 253 US 350.

149. (1931) 282 US 716.

150. 1950 SCR 88 at p. 101; AIR 1950 SC 27 at p. 35.

mental rights guaranteed by article 19(1) (a) (b), (c), (d), (e), and (g). Rejecting this argument, the learned Chief Justice observed that the true approach in dealing with such a question was only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life. On that ground alone, he was inclined to reject the contention that the order of detention contravened the fundamental rights guaranteed to the petitioner under article 19(1). At page 100 (of SCR) : (at p. 34 of AIR) of the report, Kania, C.J. stated as follows:

"as the preventive detention order results in the detention of the applicant in a cell it was contended on his behalf that the rights specified in Article 19(1) (a), (b), (c), (d), (e) and (g) have been infringed. It was argued that because of his detention he cannot have a free right to speech as and where he desired and the same argument was urged in respect of the rest of the rights mentioned in sub-clauses (b), (c), (d), (e) and (g). Although this argument is advanced in a case which deals with preventive detention, if correct, it should be applicable in the case of punitive detention also to any one sentenced to a term of imprisonment under the relevant section of the Indian Penal Code. So considered, the argument must clearly be rejected. In spite of the saving clauses (2) to (6), permitting abridgment of the rights connected with each of them, punitive detention under several sections of the Penal Code, e.g. for theft, cheating, forgery and even ordinary assault, will be illegal. Unless such conclusion necessarily follows from the article, it is obvious that such construction should be avoided. In my opinion, such result is clearly not the outcome of the Constitution. The article has to be read without any pre-conceived notions. So read, it clearly means that the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc. the question whether that legislation is saved by the relevant saving clause of article 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of article 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life. On that short ground, in my opinion, this argument about the infringement of the rights mentioned in article 19(1) generally must fail.

Any other construction put on the article, it seems to me, will be unreasonable."

It is true that the opinion thus expressed by Kania, C.J. in the case of *A.K. Gopalan v. The State of Madras* 1950 SCR 88 : (AIR 1950 SC 27) (Supra) did not receive the concurrence of the other learned judges who heard the said case. Subsequently, however, in *Ram Singh v. The State of Delhi*<sup>151</sup> the said observations were cited with approval by the Full Court. The same principle was accepted by this Court in *Express Newspapers (Pvt) Ltd. v. The Union of India*<sup>152</sup>, in the majority judgment in *Atiabari Tea Co. Ltd. v. The State of Assam*<sup>153</sup> and in *Naresh Shridhar Mirajkar v. The State of Maharashtra*<sup>154</sup>. Applying the same principle to the present case, I consider that the effect of the impugned Act on the powers of the High Court under article 226 is indirect and incidental and not direct. I hold that the impugned Act falls under the substantive part of article 368 because the object of the impugned Act is to amend the relevant articles in Part III which confer fundamental rights on citizens and not to change the power of the High Courts under article 226.

(275) In this connection I should like to refer to another aspect of the matter. The question about the validity of the Constitution (First Amendment) Act has been considered by this Court in *Sri Shankari Prasad Singh Deo v. Union of India and State of Bihar*<sup>155</sup>. In that case, the validity of the said Amendment Act was challenged, firstly on the ground that newly inserted articles 31-A and 31-B sought to make changes in articles 132 and 136 in Ch. IV of Part V and article 226 in Ch. V of Part VI. The second ground was that the amendment was invalid because it related to legislation in respect of land. It was also urged, in the third place, that though it may be open to Parliament to amend the provisions in respect of fundamental rights contained in Part III, the amendment made in that behalf would have to be tested in the light of provisions of article 13(2) of the Constitution. The argument was that the law to which article 13(2) applied would include a law passed by Parliament by virtue of its constituent power to amend the Constitution, and so, its validity will have to be tested by article 13(2) itself. All these arguments were rejected by this court and it was held in that case that the Constitution (First Amendment) Act was legally valid. The same question arose for consideration in *Sajjan Singh's* case (1965) 1 SCR

151. 1951 SCR 451 at p. 456 : AIR 1951 SC 270 at p. 272.

152. 1959 SCR 12 at pp. 129, 130 : AIR 1958 SC 578 at p. 618.

153. (1961) 1 SCR 809 at p. 864 : AIR 1961 SC 232 at p. 255.

154. Writ Petns. Nos. 5 and 7 to 9 of 1965, D/-3-3-1966: AIR 1967 SC 1.

155. 1952 SCR 89 : AIR, 1951 SC 458.

933 : (AIR 1965 SC 845) with regard to the validity of the Constitution (Seventeenth Amendment) Act, 1964. In that case, the petitioners in their Writ Petitions in this Court contended that the Constitution (Seventeenth Amendment) Act was constitutionally invalid since the powers prescribed by article 226, which is in Ch. V of Part VI of the Constitution, were likely to be affected by the Seventeenth Amendment, and therefore, the special procedure laid down under article 368 should have been followed. It was further contended in that case that the decision of this Court in *Shankari Prasad's case* 1952 SCR 89 = (AIR 1951 SC 458) should be reconsidered. Both the contentions were rejected by this Court by a majority judgment and it was held that the Constitution (Seventeenth Amendment) Act amended the fundamental rights solely with the object of assisting the State Legislatures to give effect to the socio-economic policy of the party in power and its effect on article 226 was incidental and insignificant and the impugned Act therefore fell under the substantive part of article 368 and did not attract the proviso to that article. It was further held by this Court that there was no justification for reconsidering *Shankari Prasad's case* 1952 SCR 89 = (AIR 1951 SC 458). On behalf of the respondents it was submitted by the Additional Solicitor-General that this was a very strong case for the application of the principle of *stare decisis*. In my opinion, this contention must be accepted as correct. If the arguments urged by the petitioners are to prevail it would lead to the inevitable consequence that the amendments made to the Constitution both in 1951 and in 1955 would be rendered invalid and a large number of decisions dealing with the validity of the Acts included in the 9th Schedule which were pronounced by this Court ever since the decision in *Shankari Prasad's case* 1952 SCR 89 : (AIR 1951 SC 458) was declared, would also have to be overruled. It was also pointed out that Parliament, the Government and the people have acted on the faith of the decision of this Court in *Shankari Prasad's case* 1952 SCR 89 : (AIR 1951 SC 458) and titles to property have been transferred, obligations have been incurred and rights have been acquired in the implementation of the legislation included in the 9th Schedule.

(276) The effect of land reform legislation has been clearly summarised in Ch. VIII of Draft Outline on Fourth Plan as follows:

"Fifteen years ago when the First Plan was being formulated intermediary tenures like *zamindaris*, *jagirs* and *inams* covered more than 40 per cent of the area. There were large disparities in the ownership of land held under *ryotwari* tenure which covered the other 60 per cent area; and a substantial portion of the



land was cultivated through tenants-at-will and share-croppers who paid about one-half the produce as rent. Most holdings were small and fragmented. Besides there was a large population of landless agricultural labourers. In these conditions, the principal measures recommended for securing the objective of the land policy were the abolition of intermediary tenures, reform of the tenancy system, including fixation of fair rent at one-fifth to one-fourth of the gross produce, security of tenure for the tenant, bringing tenants into direct relationship with the state and investing in them ownership of land. A ceiling on land holding was also recommended so that some surplus land may be made available for redistribution to the landless agricultural workers. Another important part of the programme was consolidation of agricultural holdings and increase in the size of the operational unit to an economic scale through co-operative methods.

**Abolition of Intermediaries:** During the past 15 years, progress has been made in several directions. The programme for the abolition of intermediaries has been carried out practically all over the country. About 20 million tenants of former intermediaries came into direct relationship with the State and became owners of their holdings. State Governments are now engaged in the assessment and payment of compensation. There were some initial delays but a considerable progress has been made in this direction in recent years and it is hoped that the issue of compensatory bonds will be completed in another two years.

**Tenancy Reform:** To deal with the problem of tenants-at-will in the ryotwari areas and of sub-tenants in the Zamindari areas a good deal of legislation has been enacted. Provisions for security of tenure, for bringing them into direct relation with the state and converting them into owners have been made in several States. As a result, about 3 million tenants and share-croppers have acquired ownership of more than 7 million acres.

**Ceiling on Holdings:** Laws imposing ceiling on agricultural holdings have been enacted in all the States. In the former Punjab area, however, the State Government has the power to settle tenants of land in excess of the permissible limit although it has not set a ceiling on ownership. According to available reports over 2 million acres of surplus areas in excess of the ceiling limits have been declared or taken possession of by Government."

(277) It is true that the principle of *stare decisis* may not strictly apply to a decision on a constitutional point. There is no restriction in the Constitution itself which prevents this court from reviewing its earlier decisions or even to depart from them in the interest of public good. It is true that the problem of construing constitutional provisions cannot be adequately solved by merely adopting the literal construction of the words used in the various articles. The Constitution is an organic document and it is intended to serve as a guide to the solution of changing problems which the court may have to face from time to time. It is manifest that in a progressive and dynamic society the character of these problems is bound to change with the inevitable consequence that the relevant words used in the Constitution may also change their meaning and significance. Even so, the court is reluctant to accede to the suggestion that its earlier decisions should be frequently reviewed or departed from. In such a case the test should be : what is the nature of the error alleged in the earlier decision, what is its impact on the public good and what is the compelling character of the considerations urged in support of the contrary view. It is also a relevant factor that the earlier decision has been followed in a large number of cases, that titles to property have passed and a multitude of rights and obligations have been created in consequence of the earlier decision. I have already dealt with the merits of the contention of the petitioners with regard to the validity of the impugned Act and I have given reasons for holding that the impugned Act is constitutionally valid and the contentions of the petitioners are unsound. Even on the assumption that it is possible to take a different view and to hold that the impugned Act is unconstitutional I am of opinion that the principle of *stare decisis* must be applied to the present case and the plea made by the petitioners for reconsideration of *Shankari Prasad's case* 1952 SCR 89 : (AIR 1951 SC 458) and the decision in *Sajjan Singh's case* 1965-1 SCR 933=(AIR 1965 SC 845) is wholly unjustified and must be rejected.

(278) In Writ Petition No. 202 of 1966, it was contended by Mr. Nambiar that the continuance of the Proclamation of Emergency under article 352 of the Constitution was a gross violation of power because the emergency had ceased to exist. It was also contended that article 358 should be so construed as to confine its operation only to legislative or executive action relevant to the Proclamation of Emergency. It was submitted that the Mysore State was not a border area and the land reform legislation of that State had no relevant connection with the Proclamation of Emergency and the fundamental rights conferred by article 19 cannot be suspended so far as the petitions are concerned. I do not think that it is necessary to express any opinion on these points

because the Writ Petition must fail on the other grounds which I have already discussed above. *It is also not necessary for me to express an opinion on the doctrine of prospective overruling of legislation.*

(279) For the reasons already expressed I hold that all these petitions fail and should be dismissed, but there will be no order as to costs.

## APPENDIX IX

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